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III.

TABLE OF AUTHORITIES CITED

CASES

STATUTES

IN THE

Supreme Court of the United States

October Term, 1962.

No. 45

Florida Lime and Avocado Growers, Inc., a Florida corporation, and South Florida Growers Association, Inc., a Florida corporation,

Appellants,

vs.

Charles Paul, Director of the Department of Agriculture of the State of California, Edmund G. Brown, Governor of the State of California, and Stanley Mosk, Attorney General of the State of California,

Appellees.

Appeal From the United States District Court for the Northern District of California, Northern Division.

APPELLANTS' BRIEF.

Opinions of District Court

This is the second appeal to this court in this action. The opinion of the District Court considered on the previous appeal is reported in 169 F. S. 774. Upon reversal of the former judgment of the District Court and remandment of the case for further proceedings (80 S. Ct. 568), the District Court after further hearing of the case rendered the opinion reported in 197 F. S. 780. (R. 757-769.)

Jurisdiction of the case

Jurisdiction of the District Court was invoked under Secs. 1331 and 1337 of the Judicial Code (28 U. S. C. A. 1331 and 1337). A three-judge District Court was convened to hear the case in accordance with Secs. 2281 and 2284 of the Judicial Code (28 U. S. C. A. 2281 and 2284.) Judgment adverse to appellants from which the present appeal was taken was entered September 22, 1961 (R. 783) and notice of appeal from said judgment was filed by appellants in the office of the clerk of the United States District Court for the Northern District of California, Northern Division, on October 10, 1961 (R. 788). Direct appeal to this court from said judgment was taken pursuant to Sec. 1253 of the Judicial Code (28 U. S. C. A. 1253.)

An order noting probable jurisdiction of the appeal was entered January 15, 1962. (82 S. Ct. 439; R. 795.)

Constitutional provisions, statutes and regulations involved

The constitutional provisions herein involved are Sec. 8(3) of Article I of the Constitution of the United States, empowering Congress to regulate commerce with foreign nations and among the several states, the provision of Sec. 1 of Article XIV of Amendments that no state shall deny to any person within its jurisdiction the equal protection of the laws, and Sec. 2 of Article VI, providing that the constitution and the laws of the United States made in pursuance thereof shall be the supreme law of the land and the judges in every state shall be bound thereby, anything in the

constitution or laws of any state to the contrary notwithstanding.

The federal statute involved is the Agricultural Marketing Agreement Act of 1937, pursuant to which the Secretary of Agriculture of the United States has promulgated Florida Avocado Order No. 69 to govern the marketing in interstate commerce of the avocados grown in South Florida. (7 U. S. C. A. 601, 602, 608, 608b, 608c, 608e, *infra*, pp. 88-95; Florida Avocado Order No. 69, R. 15.) Since said marketing order became effective on June 14, 1954, numerous regulations with respect to the maturity and quality of the avocados permitted to be marketed thereunder have been issued by the Secretary of Agriculture and published in the Federal Register. Reference to these regulations is made in appellants' statement of the case and argument.

The state statute involved is Sec. 792 of the Agricultural Code of California (Deering's California Codes, Agriculture, 1962 edition; also enforcement provisions, Secs. 784, 785, 785.6, 790, 831, *infra*, pp. 83-87)

Questions presented for review

(1)

Congress having exercised its power to regulate commerce with foreign nations and among the several states by enacting the Agricultural Marketing Agreement of 1937, and valid orders and regulations having been issued pursuant to said Act by the Secretary of Agriculture establishing standards of maturity and quality to govern the interstate marketing of the avocados grown in South Florida, may the state officers of California—in face of the Supremacy Clause of the

Constitution—disregard the certification of such avocados, under said Act and regulations, as of requisite maturity and quality for interstate marketing and, in lieu thereof, require such avocados to meet another and different standard of maturity and quality as a condition precedent to the marketing of the fruit in California?

(2)

Does not the Commerce Clause of the Constitution, even without implementation by action of Congress, preclude inhibition of sale in California of avocados grown in Florida, and shipped in interstate commerce, solely on the ground that such avocados have less than the 8% oil content demanded by Sec. 792 of the Agricultural Code of California, even though said avocados of their nature and conditions of growth mature with less than 8% oil content and are not for that reason deleterious, inimical to health, unpalatable, or of inferior quality?

(3)

Since the avocados produced in Florida are predominantly of varieties that attain maturity with less than 8% oil content, but are not for that reason of lesser healthfulness or palatability than avocados with 8% or greater oil content, while the avocados produced in California are predominantly of varieties with oil content far in excess of 8%, and since the practical effect of application of California's 8% oil requirement to the Florida avocados shipped for sale in that state is to impede the effective marketing of the Florida fruit in California, to the commercial advantage of the growers and handlers of the avocados produced in California, does not such arbitrary and invidious discrim-

ination deny to the shippers of the Florida fruit the equal protection of the laws commanded by the Fourteenth Amendment of the United States Constitution?

Statement of the case

Nature of action: The appellants, handlers of avocados grown in Florida and marketed in interstate commerce, brought this action for declaratory judgment and injunction to restrain further enforcement against them by the state officers of California of Sec. 792 of the Agricultural Code of California, barring sale in that state of all avocados which, at the time of picking and at all times thereafter, contain less than 8% of oil, by weight of the avocado excluding skin and seed. R. 8; also Appendix, *infra*, p. 87.)

Jurisdiction of the District Court was invoked under Sec. 1331 of the Judicial Code, on the ground that enforcement of said state statute to bar sale in California of avocados grown in Florida and shipped in interstate commerce, solely because such avocados have less than 8% oil content, is in derogation of Article I, Sec. 8(3) of the Constitution of the United States, also the Equal Protection clause of the Fourteenth Amendment. (Complaint, paragraph III, R. 2.) Jurisdiction of the action was invoked also under Sec. 1337 of the Judicial Code, for the reason that enforcement of said state statute to bar sale of Florida avocados in California conflicts with federal regulation of the marketing of the Florida avocados, by the Agricultural Marketing Agreement Act of 1937 and the orders and regulations issued pursuant to said Act by the Secretary of Agriculture of the United States. (Complaint, paragraph IV, R. 3-4.)

Prior judgment and appeal: The three-judge District Court, on motion of the defendants based upon the pleadings and the depositions and answers to interrogatories then on file, dismissed the action for want of jurisdiction. On the prior appeal to this court, said judgment was reversed and the case was remanded to the District Court for further proceedings not inconsistent with the opinion of this court. (*Florida Lime and Avocado Growers, Inc. v. Jacobsen*, 362 U. S. 73, 80 S. Ct. 568.)

Second judgment and appeal: Upon trial of the case pursuant to the order of remandment, the District Court dismissed the complaint on the merits. (R. 757, 783.) The present appeal is from this judgment.

FACTS OF THE CASE MATERIAL TO THE QUESTIONS PRESENTED

The Florida avocado industry

The avocado is a tropical and sub-tropical fruit, introduced commercially in the United States during the first decade of this century, grown since then commercially only in southern areas of Florida and California. Description of the fruit is complicated by the multiplicity of varieties, differing radically in shape, size, type and color of skin and flesh, season of growth, oil or fat content and other attributes. Those grown in the two states are of different origin and varieties. The California avocados trace back to seeds or cuttings imported from the high altitudes of Mexico and Guatemala, while the Florida avocados have as their antecessors seeds from the West Indies and lowlands of Guatemala. Hybrids between the West Indian and

Guatemalan races have originated in Florida, propagated there by budding and grafting, and now comprise an important portion of the commercial production, notably the Lula, Booth 7 and Booth 8 varieties.

Until about 1940, the avocado acreage in Florida was relatively static, no more than about 2,000 acres. Then began heavy planting of trees that by 1950 augmented the avocado area to about 11,000 acres and the annual crop from 100,000 bushels to about 600,000 bushels, with many of the recently planted trees yet to come into fruition. (R. 254.) Impetus to this increased production came from developments which made feasible the marketing of the fruit throughout the country, such as pre-cooling facilities in the newer packing houses, transportation by refrigerated trucks, betterment of highways, refrigerated storage at point of arrival.

With the upsurge in production, unaccompanied by either state or federal regulation of the marketing of the fruit, self-regulation by the growers and handlers proved inadequate to keep immature and inferior avocados from the market. To protect the industry from threatened deterioration, growers and handlers of the fruit petitioned the Secretary of Agriculture to come to their aid by exercising the authority vested in him by the Agricultural Marketing Agreement Act of 1937 to enter into a proposed marketing agreement under which satisfactory standards of maturity and quality would be imposed on the marketing of the fruit. Upon public hearings, as provided by the Act, the Secretary made findings: that 80% to 90% of the avocados grown in Florida are sold in markets outside the state; that all handling of avocados grown in the Florida

production area is in the current of interstate and foreign commerce, or directly affects such commerce; that sale of avocados that are immature and otherwise of poor quality has tended to reduce the demand and prices for Florida avocados; that the situation could be remedied by imposition of official standards of quality and maturity, under a marketing agreement and order, as a condition precedent to the marketing of Florida avocados. (Findings and decision of Secretary of Agriculture, April 24, 1954 and May 14, 1954, 19 F. R. 2418 and 2784; R. 3-4.)

The proposed marketing agreement was duly executed by the requisite number of handlers of avocados grown in South Florida and approved by referendum vote of the producers for market, in the period from April 1, 1953 through March 31, 1954, of at least two-thirds of the volume of avocados represented in such referendum, whereupon the proposed marketing agreement became effective June 11, 1954. (Marketing Order No. 969, referred to as No. 69, 19 F. R. 3439; 7 C. F. R. part 969, pp. 119-131 and Suppl. pp. 14-18;—Exhibit "A" to complaint, R. 15-33.)

Since the 1954-55 crop season, shipment of avocados from Florida has been permitted only after inspection of the fruit by the joint inspection service of the U. S. Department of Agriculture and the Florida Department of Agriculture and issuance of a certificate of compliance with the maturity and quality regulations promulgated from time to time by the Secretary of Agriculture under the general marketing order of June 11, 1954. (Pl. Ex. 3, R. 355; also R. 151-152, 315-316, 349-350.)

Maturity and quality regulations under federal marketing order

In each crop year (from April 1 to March 31 of the ensuing year), maturity regulations are issued by the Secretary of Agriculture fixing the time of the year when the different varieties of Florida avocados may be picked and shipped. Picking dates are recommended to the Secretary by the Avocado Administrative Committee composed of growers and handlers, organized pursuant to the general marketing order. Meetings of the committee are attended by representatives of the Department of Agriculture. (R. 207.) The recommendations adopted by the committee are sent to the Secretary and his staff for consideration and official action.

Each year since 1954, permissible dates for picking and shipping some 40 varieties of Florida avocados have been established by orders of the Secretary, published in the Federal Register. (R. 622-623.) For each variety, in each year, permissible picking dates are specified in relation to the attainment by the fruit of stated minimum weight, or minimum diameter: an "A" date, with highest weight requirement; a "B" date, generally about two weeks later, with somewhat lower weight requirement; a "C" date, another two weeks later, with a further decrease in weight requirement; a final "D" date, when the undisposed of balance of the variety may be picked and shipped without minimum weight restriction. (For illustration, see Pl. Ex. 9, a summary of the official picking dates in the 1957-58 season, R. 364.)

Oil content of the avocados—the exclusive criterion of maturity under Sec. 792 of the Agricultural Code

of California, with minimum requirement of 8% oil content—does not enter into determination of maturity of any of the Florida avocados; instead, as above stated, only correlation of picking dates with attained weight or diameter. (R. 594-596.)

Quality regulations, in addition to the maturity regulations, have also been issued by the Secretary from time to time, such as exhibit "C" attached to the complaint. (R. 36.) Here, also, oil content is not a factor.

That oil content is not a valid determinant of maturity and quality of Florida avocados, and that maturity and good quality of the fruit is assured by enforcement of the standards established under the Florida marketing order, is shown by the testimony of Dr. Roy W. Harkness and Dr. Paul L. Harding, here summarized.

Testimony of Dr. Roy W. Harkness

Dr. Harkness, of the University of Florida, has been engaged since 1946 in various chemical research projects at the Sub-Tropical Experiment Station of the university in Homestead, Florida. He received his degree of Ph.D. in Physical Chemistry at the University of California in 1928; worked for the Department of Agriculture in its Washington research laboratories for about seven years, then for about eleven years in the research department of Houdry Products Corporation of Pennsylvania. (R. 208-209.)

In the fall of 1951, he undertook a research project, called State Project 675, on the subject of the maturity of Florida avocados, a study conducted through four crop years. (R. 209-210.) In the early period of this

research project, principal consideration was given to the measure of oil content as a possible determinant of maturity of the Florida avocados. Oil tests were made of a great many avocados taken from groves in the Homestead Sub-Tropical Experiment Station and from various commercial groves in and around Dade County. The avocados used in the research project were selected by Dr. Harkness personally. (R. 210, 224.) Likewise, the oil tests were made by Dr. Harkness himself or under his supervision. (R. 214.) The method used to measure oil content was essentially the same as the method used in California. (R. 210-211, 243-246.) The results of the oil tests were recorded by Dr. Harkness, in books produced upon the taking of his deposition, and photostatic copies of the relevant pages of these books, together with a typewritten summary of selected oil tests prepared for publication, were collectively made part of the deposition as plaintiffs' exhibit 16. (R. 389-437; 211-213.)*

Dr. Harkness testified that the real measure of maturity of the avocado is the quality of the fruit as judged by the people who eat it, that it is just a matter of having a fruit that is enjoyable to eat and at the same time has a satisfactory food value; that no correlation was found between oil content and quality of the fruit, when all of the different varieties

*Plaintiffs' exhibit 16 shows also the results of oil tests made at the Experiment Station, at request of various growers and handlers of the avocados, after the conclusion of the research project early in 1955. These subsequent oil tests, made as a public service to growers and handlers of the fruit who desired to make shipments to California and sought to ascertain whether such shipments could be risked in face of California's 8% oil content requirement, were not considered by Dr. Harkness in arriving at his conclusions. (R. 163-165, 218-219, 248.)

were considered together, since several of the earlier varieties matured to a satisfactory quality at a point of time at which the oil content was in the range of 3% to 6%, while some of the late maturing varieties did not reach edible condition until the oil content was comparatively high, perhaps 7% to 8% or even higher. (R. 215-218.)

As to avocados of the same variety, serious difficulty was found in use of oil content as a measure of maturity because of the variability in oil content of samples of the fruit taken at the same time from different groves, or from different trees in the same grove, or even from the same side of a single tree. Fruit that looked alike, taken from the same part of a tree, showed a difference of 3% in oil content, but no difference in flavor. (R. 216, 239-240.)

Difference in oil content of the avocados was not traceable to difference in horticultural methods. Great variations were found in oil content of avocados of the same variety taken from different groves where the same fertilizers were used and the spray treatment was identical. (R. 217.) Conversely, no relation was found between oil content and use of a different fertilizer. (R. 217.) These variations in oil content of avocados of the same variety, taken at the same time from different groves, or from different trees in the same grove, or even from the same tree, remain unexplained. (R. 217.)

Results of oil tests in State Project 675, in relation to marketing of the fruit

The great number of oil tests of Florida avocados made in the research project conducted by Dr. Harkness reveal, incidentally, the arbitrariness of the California 8% oil content standard in application to the Florida avocados. For illustration, a summary is submitted of the oil tests made in the 1953-54 and 1954-55 seasons of eight commercial varieties of Florida avocados, accounting for approximately 80% of the annual crop, in relation to the marketing season for the respective varieties. (Oil tests—Pl. Ex. 16, R. 389-418.)

Pollock

The Pollock, a prime representative of the early summer varieties of Florida avocados, is marketed from the first of July to about the end of August. (Pl. Ex. 4, 7, 9 and 14, deposition of David M. Biggar, R. 356, 361, 364, 379.)

1953-54:

Oil tests of 74 samples of Pollock avocados,* made from July 6 to August 12, 1953, showed oil content ranging from 1.6% to 3.3%. (No further oil tests of Pollocks were made in the 1954-55 season.)

Waldin

The Waldin is the most important commercially and latest in maturity of the Florida avocados of West Indian origin. The marketing period of the Waldin begins in the latter part of August and extends to the forepart of October. (R. 356, 361.)

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*The oil tests, in most instances, were of composite samples of 10 avocados, selected for uniformity of size. (R. 219, 431.)

The Waldin oil tests:

1953-54:

Tests of 75 samples of Waldins, July 27 to September 22, 1953, oil 2.1% to 6.1%.

1954-55:

Tests of 23 samples, July 20 to September 8, 1954, oil 3.2% to 5.0%.

Booth 8

The Booth 8, most highly favored of the series of West Indian-Guatemalan hybrids originated by Will Booth, second in volume of production among all Florida avocados in the four seasons from 1955-56 through 1958-59, and first in 1959-60 (Deft. Ex. E, R. 488-492), is of constantly increasing commercial importance. Shipment of this variety to California has never been ventured.

The marketing period of the Booth 8 begins about the middle of September and is at its height in October and November, with minor holdover in December. (R. 356, 361.)

The Booth 8 oil tests:

1953-54:

53 tests from August 12 to September 30, 1953, oil 2.7% to 5.9%.

24 tests, October 1 to 30, 1953, oil 4.4% to 6.8%.

28 tests, November 7 to 25, 1953, oil 4.7% to 8.4%, 26 under 8%.

3 tests, December 3 and 16, 1953, oil 8.3%, 9.3% 8.8%.

1954-55:

31 tests, August 16 to September 30, oil 3.2% to 6.2%.

16 tests, October 5 to November 10, oil 5.1% to 7.1%.

Lula

The Lula, also a West Indian-Guatemalan hybrid, was until the 1959-60 season the leading Florida avocado in volume of production, with the longest marketing period. Shipments of Lulas begin early in October and are heaviest in November, December and January, with a residue in February and March. (R. 356, 361.) Substantially all shipments of Florida avocados to California have been Lulas. (R. 257, 438-439, 443-444.)

The Lula oil tests:

1953-54:

127 tests, August 12 to September 30, 1953, oil 2.3% to 7.9%.

91 tests, October 1 to 30, 1953, oil 4.9% to 11.0%, 78 under 8%.

101 tests, November 2 to 30, 1953, oil 5.4% to 11.3%, 58 under 8%.

88 tests, December 2, 1953 to January 13, 1954, oil 4.5% to 13.1%, 32 under 8%.

1954-55:

30 tests, August 24 to September 28, 1954, oil 2.9% to 5.7%.

85 tests, October 4 to 29, 1954, oil 4.7% to 9.2% 75 under 8%.

44 tests, November 1 to 30, 1954, oil 5.7% to 9.6%, 28 under 8%.

21 tests, December 6, 1954 to January 11, 1955, oil 7.1% to 12.9%, 4 under 8%.

Booth 7

The Booth 7, next to the Booth 8 and Lula in commercial importance, is marketed from about the middle of October to the middle of December. (R. 356, 361.)

The Booth 7 oil tests:

1953-54:

27 tests, September 9 to October 14, 1953, oil 3.2% to 6.9%.

49 tests, October 16 to 30, 1953, oil 4.2% to 8.3%, 46 under 8%.

60 tests, November 2 to 23, 1953, oil 4.1% to 11.1%, 45 under 8%.

34 tests, December 1 to 16, 1953, oil 6.4% to 12.0%, 10 under 8%.

1954-55:

10 tests, September 15 to October 12, 1953, oil 3.8% to 6.5%.

22 tests, November 2 to 30, 1953, oil 4.1% to 9.8%, 12 under 8%.

6 tests, December 6 to 14, 1954, oil 5.0% to 10.9%, 2 under 8%.

Hickson

The Hickson, another hybrid, is marketed in small volume in the latter part of October, but mainly in the month of November and the forepart of December. (R. 356, 361.)

The Hickson oil tests:

1953-54:

10 tests, September 29 to October 30, 1953, oil 5.8% to 7.4%.

6 tests, November 12 to December 4, 1953, oil 6.9% to 10.0%, 3 under 8%.

1954-55:

13 tests, September 22 to November 10, 1954, oil 6.7% to 9.6%, 9 under 8%.

Booth 1

The Booth 1, of lesser commercial importance than the Booth 8 and Booth 7, has a marketing period beginning about the end of November and running into January. (R. 356, 361.)

The Booth 1 oil tests:

1953-54:

9 tests, October 22 to December 16, 1953, oil 7.5% to 10.9%, 2 under 8%.

1954-55:

11 tests, November 1 to December 14, 1954, oil 8.0% to 11.7%.

Taylor

The marketing period of the Taylor, an avocado of the Guatemalan race, begins about the middle of November and continues through February. (R. 356, 361.) Production of this variety averages less than 3½% of the annual Florida crop. (Deft. Ex. E, R. 488-492.)

The Taylor oil tests:

1953-54:

21 tests, October 22 to November 18, 1953, oil 6.1% to 9.9%, 12 under 8%.

18 tests, November 24, 1953 to January 13, 1954, oil 7.4% to 11.4%, 4 under 8%.

1954-55:

16 tests, November 1 to December 14, 1954, oil 7.1% to 10.2%, 6 under 8%.

* * * * *

The California oil test is of individual avocados,* selected as "the least maturing appearing avocados" (R. 639), and the statute allows no percentage of tolerance for avocados containing less than 8% oil. Thus, although a composite sample of a number of avocados may show 8% or more oil, this by no means obviates risk that a truck load of avocados of the same variety, even if picked from the same grove, will not have some avocados with less than 8% oil which may be among those selected for the oil test. (See Pl. Ex. 22, R. 445.)

To recapitulate, Dr. Harkness found no correlation between oil content of the Florida avocados and maturity or quality of the fruit. Great variation in oil content was found between avocados of the same variety picked at the same time not only from trees in different groves, but also when picked from different trees in the same grove or block, or even from the same tree. These variations in oil content, unexplained by difference in growing conditions or horticultural procedures, excludes use of oil percentage as a valid determinant of maturity or quality of the Florida fruit, even in application of such percentage to avocados of the same variety, much less in application to all avocados without regard to the inherent differences between varieties.

When the oil tests made by Dr. Harkness are considered in relation to the California requirement of 8% oil content for sale of the Florida avocados in that state, it is indicated: (1) that some commercially im-

*Fred Pigwaty, secretary of Florida Lime and Avocado Growers, Inc., testified that on shipments of Florida avocados to California in the 1954-55 season the oil tests made in California were of composite samples. (R. 321.) This testimony was unrefuted. In subsequent years, however, the oil tests were of individual avocados.

portant varieties of Florida avocados are completely barred from sale in California because they never attain 8% oil content at any time during the marketing season for these avocados (*e.g.*, Pollock, Waldin); (2) that the marketing season of the highly important Booth 8 and Booth 7 varieties, comprising over 40% of the 1959-60 crop (Deft. Ex. "E", R. 488-492), is nearly at an end before any of these avocados attain 8% oil content, then only in negligible volume; (3) that although the Lula, first in volume of production until the 1959-60 season, attains 8% oil content in greater number during the marketing season for this variety, samples of Lulas tested late in the season still showed less than 8% of oil, so that hazard of failure to pass an 8% oil test persists throughout the season; (4) that the late maturing varieties, such as the Hickson, Booth 1 and Taylor, all of relatively minor commercial importance, although inherently of higher oil content than the summer and autumn varieties, fell short of 8% oil in some of the tests made in December and January, also showed similar unforeseeable variations in oil content as the earlier maturing varieties.

Certain coincidental circumstances relevant to the marketing of Florida avocados in California greatly enhance the significance of these oil tests. The residents of California consume about as many avocados as are consumed in all the other states together.* Notwithstanding California's own large production of avocados,

*This estimate is made from records of unloads of avocados at the principal wholesale markets in California, together with records of the total production of avocados in the United States, embodied in answers to interrogatories by W. C. Jacobsen, former Director of the Department of Agriculture of the State of California. (R. 48-51, 53-59.)

the supply of home grown avocados in that state is at lowest ebb in the period when Florida avocados are most abundant. Because of this coincidence, the demand in California for Florida avocados is most insistent in September, October and November, when the California supply is dwindling, but this demand cannot be met because the Florida handlers cannot make firm commitment to deliver avocados with 8% oil content in California on a schedule to coordinate with programs of retail merchandising of the fruit. (Deposition of Harold E. Kendall, R. 265-266, 269-272, 301.)

Testimony of Dr. Paul L. Harding

Dr. Paul L. Harding, horticulturist and plant chemist, has been in the employment of the United States Department of Agriculture since 1930 and now has charge of the U. S. Horticultural Field Station at Orlando, Florida, also the Agricultural Marketing Service Station at Miami. His study of horticultural plant physiology and plant chemistry began at Brigham Young University and included post-graduate work at the University of Utah, Utah State Agricultural College and Iowa State College. At Iowa State College he received his Ph.D. degree and served on the staff in the horticultural department. In the Department of Agriculture, by a series of promotions, he became Principal Plant Physiologist in 1949, then Supervisory Plant Physiologist in 1959. (R. 558-559.)

Dr. Harding came to Florida from the Washington office of the Department of Agriculture in 1935 and has since then been continuously engaged in research projects on Florida fruits. What brought him to Florida was an appeal by members of the citrus industry

of that state to the U. S. Department of Agriculture to undertake research that might lead to the establishment of more satisfactory standards for determination of the maturity of the Florida fruits. Upon assignment to this project, Dr. Harding spent three to four years in intensive study of Florida oranges, followed by about four years of study of grapefruit, then tangerines, temple oranges, tangelos and Murcott Honey oranges. In 1949, on the basis of the data accumulated by Dr. Harding, Florida adopted a new set of standards for citrus fruits, an achievement for which he received notable merit awards. (R. 560-561.)

In 1953 another appeal for help came from Florida to the U. S. Department of Agriculture, the petition by growers and handlers of Florida avocados to the Secretary of Agriculture to enter into a marketing agreement to govern the sale of their fruit. Dr. Harding was called upon to participate in the consideration of this petition and thereupon began his study of Florida avocados.

The aim of the research conducted at the Florida stations of the Department of Agriculture under the direction of Dr. Harding was to determine what standards of maturity and quality would best assure customer acceptance of the Florida avocados, thereby to promote the successful marketing of this fruit. Such a research project could be undertaken only with approval and budgetary provision by the officers in charge of the research center in the Washington office of the Department of Agriculture. All data gathered in the research become part of the records of the Department of Agriculture; summaries of the progress of the research are included in annual reports to the Sec-

retary of Agriculture; such summaries, when approved for general publication by the officers of the department, appear also in appropriate horticultural journals.* (R. 568, 573, 583.)

In the first year of Dr. Harding's avocado research, the 1953-54 crop year, tests were made at the Orlando station of 200 lots of avocados (3110 individual avocados), representing 16 commercial varieties of the fruit, to ascertain whether maturity and palatability of the fruit could be assured by designating picking dates for each variety in correlation with attainment of specified minimum weight, as proposed by sponsors of the proposed marketing agreement. (Pl. Ex. 23, R. 446-467.) To arrive at a judgment as to the palatability of the fruit—the "flavor" or "customer acceptance,"—Dr. Harding called to his assistance a panel of qualified tasters of the fruit and directed them to record their rating of the flavor of the fruit by use of a numerical score card formulated by him.** Evaluation of the

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*The research projects are also submitted for approval to the National Citrus and Subtropical Research & Marketing Advisory Committee, composed of members from all over the United States, and reports of the progress of the research are also made to this committee, for recommendations by the committee to the Secretary of Agriculture. (R. 559.)

**Dr. Harding's score card for testing taste or flavor of avocados provides for numerical ratings in four categories:
Green: grassy bitter, unpleasant after taste, unpalatable and rubbery to soft texture; does not meet consumer acceptance; numerical rating range—50 to 59.
Unpalatable: flat, watery, slightly bitter, slightly unpleasant after taste, rubbery to soft texture: does not meet consumer acceptance; numerical rating range—60 to 69.
Palatable: smooth, mellow, watery, satisfactory flavor; firm to soft texture; meets minimum standard of consumer acceptance; numerical rating range—70-79.
Excellent: smooth, mellow, tasty, rich, nutty with quality of distinct excellence and buttery texture; numerical rating range—80-100.
(R. 565-568; Pl. Ex. 23, R. 450.)

quality of fruits and other edibles by panels of tasters is standard procedure in research on maturity and quality. (R. 566.)

The general findings derived from the 1953-54 tests showed a close relation between quality of fruit and definite picking dates and weight; that in the 1953-54 crop year, the proposed standards would have permitted the shipment of fairly satisfactory fruit; that maturity of fruit within a variety could be fairly well defined on the basis of specified picking dates in conjunction with minimum weight. (R. 452.)

Additional tests of the relation of palatability of the fruit to picking date and weight were made at the Orlando station in the 1954-55 crop year, the first year under the marketing agreement. Two hundred and nine samples of 31 different varieties of avocados, each sample consisting of 30 fruit picked at random from 16 South Florida groves, were tested. (Pl. Ex. 24, R. 468-477.) The findings were that "Palatability of fruit at any date of picking was associated with a minimum weight and a corresponding diameter." Further: "There seemed to be little connection between flavor and physical characters other than picking date, weight or diameter. . . . There appeared to be a straight-line relationship between picking date, fruit weight and fruit diameter and flavor rating from maturity to post-maturity for Lula, Booth 8, Booth 7, Hickson, Taylor and Booth 1 varieties." (R. 473, 477.)

In the 1955-56 crop year, the scope of the research was enlarged to take account of various chemical changes of the fruit during the growing season, in addition to changes in weight and diameter, in relation to ma-

turity and quality of the fruit, *viz.*, total soluble solids in the fruit, phenolic compounds, reducing sugars and oil content. Over 5,000 avocados were tested, consisting of 60-fruit samples of 14 varieties of the fruit picked each week for a period of six weeks, half of each 60-fruit sample including fruit below the minimum weight for picking prescribed under the marketing agreement and half fruit that met or exceeded the minimum weight requirement for marketing. Some of the samples were picked before the earliest permissible picking date under the marketing regulation and some after this date. Half of each sample, 15 below and 15 above minimum weight requirement, was retained at Homestead, in Dade County, where the samples of all but one of the varieties were picked, for the chemical tests to be made at the Miami Station of the U. S. Department of Agriculture; the other half was shipped to Orlando, for the palatability tests to be made after ripening of the fruit. (R. 480.)

A complete record of all these tests appears in plaintiffs' exhibit 25. (R. 478-485.) An abbreviated version of this exhibit, limited to the eight leading varieties of the fruit, and omitting the percentages of soluble solids, phenolic compounds and reducing sugars, is here presented:

Tests of Florida avocados made in 1955-56 season at Miami and Orlando Stations of U. S. Department of Agriculture, Marketing Service, Quality Maintenance and Improvement Section

Variety	Date picked[1]	Hard fruit (Homestead)				Soft fruit (Orlando)			
		average weight		oil content		average weight		flavor[2]	
		below min. wt.	above min. wt.	below min. wt.	above min. wt.	below min. wt.	above min. wt.	below min. wt.	above min. wt.
POLLOCK	1955	ounces		percent		ounces		numerical rating	
4.55% of 1955-56 crop.	June 27	13.6	16.7	2.4	1.8	12.7	17.5	65	69
Earliest regulated picking date in season, July 4, 1955, at minimum of 16 ounces.	July 5	12.0	17.6	1.9	3.1	13.7	20.1	73	75
	" 11	11.8	22.4	2.5	2.6	13.7	21.6	75	77
	" 18	11.6	22.7	3.1	3.1	13.6	17.8	80	85
WALDIN									
9.73% of 1955-56 crop.	August 1	14.2	16.4	4.9	5.3	14.6	17.3	65	73
	" 8	14.2	17.1	4.9	4.6	13.4	17.4	70	78
Earliest regulated picking date in season, August 1, 1955, at minimum of 16 ounces.	" 15	13.4	17.1	3.3	3.6	13.8	18.0	75	85
	" 22	13.6	16.8	3.3	3.3	14.2	17.4	70	72
	" 29	14.3	17.3	4.2	4.2	13.9	18.7	78	85
	September 6	13.0	17.9	3.9	3.9	13.8	18.4	81	86

[1]Each date: sample of 60 fruit picked in vicinity of Homestead, 30 *below* and 30 *above* minimum weight requirements for marketing under 1955-56 regulations; half of each sample retained at Homestead for chemical tests, half shipped to Orlando for flavor tests.

[2]Flavor rating in accordance with Dr. Harding's score card: under 70, unpalatable; 70-79, palatable; 80-100, excellent. Tests made after softening in storage chamber at 80°F.

Tests of Florida avocados in 1955-56 season—page 2

Variety	Date picked[1]	Hard fruit (Homestead) average weight below min. wt.	Hard fruit (Homestead) average weight above min. wt.	Hard fruit (Homestead) oil content below min. wt.	Hard fruit (Homestead) oil content above min. wt.	Soft fruit (Orlando) average weight below min. wt.	Soft fruit (Orlando) average weight above min. wt.	Soft fruit (Orlando) flavor[2] below min. wt.	Soft fruit (Orlando) flavor[2] above min. wt.
	1955	ounces		percent		ounces		numerical rating	
BOOTH 8									
16.56% of 1955-56 crop.	August 29	11.6	14.5	4.2	4.2	11.7	15.6	60	68
	September 6	11.2	16.7	5.4	5.4	11.3	16.4	71	78
Earliest regulated picking	" 12	11.1	15.4	4.6	4.6	10.8	16.7	74	79
date in season, September	" 19	10.3	16.9	4.9	4.9	10.9	15.8	76	80
19, 1955, at minimum of	" 26	11.7	15.2	4.7	5.3	10.9	15.5	75	76
14 ounces.	October 3	10.3	16.1	5.2	5.2	11.3	15.9	78	77
BOOTH 7									
13.29% of 1955-56 crop.	September 19	11.0	17.7	3.5	4.2	13.0	19.3	77	76
	" 26	12.9	16.8	3.8	4.6	11.9	17.7	78	79
Earliest regulated picking	October 3	13.0	17.3	5.2	4.0	11.6	19.0	76	79
date in season, October 10,	" 10	11.6	16.9	4.4	4.6	12.1	19.7	78	79
1955, at minimum of 16	" 17	13.3	17.8	4.2	4.7	13.4	18.7	81	84
ounces.	" 24	13.6	17.9	5.2	6.9	12.0	18.8	77	81
LULA									
24.07% of 1955-56 crop.	September 26	14.3	16.4	4.3	5.3	14.3	17.3	76	74
	October 3	14.0	16.8	5.7	6.9	12.6	17.8	73	75
Earliest regulated picking	" 10	14.2	16.6	6.5	5.1	12.5	17.7	75	77
date in season, October 17,	" 17	13.2	18.0	4.8	5.6	11.9	17.8	72	75
1955, at minimum of 16	" 24	14.1	17.2	5.1	6.0	13.4	17.4	76	76
ounces.*	" 31	12.7	17.9	5.2	6.4	13.8	17.3	74	76

*Picking date of October 3, 1955, at minimum of 18 ounces, disregarded in this study.

Footnotes (1) and (2) at p. 25, *supra*.

Tests of Florida avocados in 1955-56 season—page 3

Variety	Date picked[1]	Hard fruit (Homestead)				Soft fruit (Orlando)			
		average weight		oil content		average weight		flavor[2]	
		below min. wt.	above min. wt.	below min. wt.	above min. wt.	below min. wt.	above min. wt.	below min. wt.	above min. wt.
	1955	ounces		percent		ounces		numerical rating	
HICKSON									
3.57% of 1955-56 crop.	September 26	11.3	16.1	5.8	5.3	12.1	18.2	75	77
	October 3	10.7	16.9	6.2	6.6	10.7	16.1	71	72
Earliest regulated picking	" 10	10.5	14.5	7.2	5.6	9.7	16.1	72	73
date in season, October 17,	" 17	8.6	15.5	5.4	6.1	9.9	17.6	72	75
1955, at minimum of 14	" 24	11.2	17.5	6.0	6.1	10.5	16.8	68	69
ounces.	" 31	11.9	15.3	7.4	7.4	11.5	16.5	69	69
BOOTH 1									
5.60% of 1955-56 crop.	October 31	12.3	—	—	—	12.9	—	64	—
	November 7	11.7	17.9	6.0	9.2	12.6	19.3	72	74
Earliest regulated picking	" 14	13.1	17.4	6.6	8.2	12.7	20.0	72	72
date in season, November	" 21	12.1	17.4	6.7	7.1	11.9	21.9	76	82
21, 1955, at minimum of	" 29	11.7	19.4	6.9	10.0	13.3	20.6	75	80
16 ounces.	December 6	12.3	18.6	9.2	10.3	12.5	19.9	72	74
TAYLOR									
2.97% of 1955-56 crop.	November 1	10.0	11.8	6.0	6.0	10.7	12.6	69	71
	" 8	10.4	12.1	5.4	5.4	10.7	13.0	78	79
Earliest regulated picking	" 15	9.8	12.1	6.0	6.2	10.8	13.0	76	76
date in season, November	" 22	10.2	12.4	6.4	7.3	10.8	13.3	81	84
21, 1955, at minimum of	" 28	9.9	12.2	7.4	7.8	9.5	13.4	82	86
12 ounces.	December 5	9.7	12.1	7.5	7.6	11.1	13.0	81	82

Footnotes (1) and (2) at p. 25, *supra*.

The analyses of these avocados for percentage of soluble solids, phenolic compounds, reducing sugars and oil content, each week for six weeks before and after the earliest picking date for each variety under the maturity regulations, showed no appreciable change in the percentage of any of these components of the fruit during the six weeks. In the palatability tests, after softening of the fruit to the proper stage of ripeness, no statistical correlation was found between flavor of the fruit and percentage of soluble solids, phenolic compounds, reducing sugars, or oil content. The ultimate conclusion, accordingly, was that the maturity regulations under the marketing agreement, based on correlation of weight of the fruit and picking dates, remained the most satisfactory determinant of maturity of the Florida avocados. (R. 482.)

Continued studies of maturity and quality of the Florida avocados made by Dr. Harding and his staff in subsequent crop seasons confirmed the findings made in the 1955-56 and prior seasons. (Pl. Ex. 26, R. 486-487.)*

The 1955-56 oil tests directed by Dr. Harding, like the oil tests made in previous years by Dr. Harkness

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*From plaintiffs' exhibit 26, R. 486: "During 1958-59, 1959-60 and 1960-61 approximately 3,500 individual avocados were analyzed for oil content and measured for weight and diameter. These studies included 37 different varieties. . . . In general, over the three-year period, the initial release dates and the date at which the fruit was at minimum consumer acceptability or above were in agreement. Extreme conditions, such as the freeze which occurred in the 1958-59 season, delayed the maturity of the fruit. . . . Present methods of establishing maturity standards on the basis of weights or diameters at specified picking dates are reasonably satisfactory. Standards based on oil content are not practical for Florida avocados because of the high degree of variation between varieties, among individual fruits of a variety, and the year-to-year variation."

and his assistants, reveal graphically the handicap of attempting to market Florida avocados in California in face of the 8% oil requirement. At no time in the series of tests, particularly those made on or after the initial picking date for each variety, did any sample of the Pollock, Waldin, Booth 8, Booth 7, Lula, Hickson and Taylor varieties contain 8% of oil, although half of these samples were of avocados weighing more than the required weight for immediate marketing. As to the Booth 1, which has a relatively short marketing season, the above-weight sample tested for oil content on November 21, 1955, when it became eligible for marketing, also contained less than 8%.

Dr. Harding testified that in his opinion, based on his training and experience as plant physiologist and chemist, and his eight years of special research work on the avocados grown in Florida, percentage of oil content is not a scientifically valid determinant of maturity and quality of the Florida avocados; that the oil tests of Florida avocados made by him and his assistants showed that there is considerable variation in oil content among any given lot of these avocados picked at one time; that his panel of tasters could not differentiate between the avocados of higher or lower oil content, or give preference to either; that a specified percentage of oil content, such as 8%, applied to avocados generally, disregards the fact that some Florida varieties of the fruit are acceptable and palatable at 2% or 3% of oil, nevertheless these varieties are condemned entirely by an 8% oil requirement; that other Florida varieties, West Indian-Guatemalan hybrids, might attain 8% oil content at some time if left on the tree long enough, possibly the last 20%, but some

of these would drop to the ground and others would become overripe and would not have the requisite carrying qualities for shipment. (R. 584-585, 616-620.)

Appellants' interest

Appellants are leading handlers of Florida avocados registered and authorized to operate as such handlers under the marketing order of June 11, 1954. (Pl. Ex. 1 and 2, R. 353, 354.) Appellant Florida Lime and Avocado Growers, Inc., is a corporation for profit that succeeded to the business of a cooperative organized in 1939. Appellant South Florida Growers Association, Inc., is successor to the business operated individually by Harold E. Kendall commencing in 1939. Each of the appellants has a packing house in Dade County, Florida, where avocados are graded, packed, refrigerated and shipped for sale. Appellants also have avocado groves of their own and operate other groves as lessees or managers.

Sales of avocados by Florida Lime and Avocado Growers, Inc., in the six seasons from 1954-55 through 1959-60, aggregated $1,299,920; sales of South Florida Growers Association, Inc., in these six seasons, $4,899,722. (R. 120-125, 549-552.) Approximately 98% of these sales were made outside the state of Florida. (R. 441-442.)

Both appellants, prior to the institution of this suit, made assiduous efforts to avail themselves of the California market for Florida avocados, notwithstanding the California requirement of 8% oil content for sale of the fruit in that state, as appears from their exhibits 19 and 20, also defendants' exhibits P, Q, R and S. (R. 440, 441, 499-504.) As a precaution

to minimize risk of rejection of the avocados to be shipped to California, appellants procured oil tests of many samples of the fruit at the Homestead Subtropical Experiment Station of the University of Florida before attempting such shipments. (Pl. Ex. 12 and 13, R. 257-262, 317-318, 371, 375.) These oil tests were principally of Lula samples, a few of the several Booth varieties and of Hickson and Taylor. The materiality of these oil tests is twofold: first, as evidence of appellants' efforts to meet demand for their fruit in California, and second, as evidence of inability to meet this demand because of unavailability of Florida avocados with 8% oil content in sufficient volume to make shipments to California during the first several weeks of the marketing season for the principal varieties, nor even thereafter with the consistency needed for more than sporadic sales.

Of the many samples of Lulas tested, only a negligible number showed 8% oil content during the first month or more of the marketing season for this variety, which begins normally during the first week of October. From mid-November onward, more of the Lulas showed 8% of oil, yet even in late November and December many of the samples ran under 8%, some even under 7%. (R. 371-378.)

Not only has the 8% oil barrier greatly restricted appellants' access to the California market for their avocados, their efforts to make sales of the fruit in California in face of the 8% oil requirement have resulted in cash losses, as set forth in their exhibits 17 and 21. (R. 438, 443.) Of special significance is the late time in the marketing season when appellants' attempted sales in California were thwarted by the 8% oil test, *viz.:*

Shipments of avocados to California by appellants barred from sale upon oil test

Florida Lime and Avocado Growers, Inc.:

November 10, 1955: 1129 lugs (@ 13½ to 15 lbs.) of Lula avocados shipped to Safeway Stores at Oakland, entire load rejected and reshipped to Salt Lake City.

November 12, 1955: 2083 lugs of Lula avocados shipped to Safeway Stores at Sacramento and Oakland, entire load rejected and reshipped to Portland.

November 14, 1955: 2208 lugs of Lula avocados shipped to Safeway Stores at Oakland, entire load rejected and reshipped to Medford, Oregon, and Seattle.

December 8, 1955: 700 lugs and 200 spruce boxes (@ 40 lbs.) of Lula avocados shipped to Mendelson-Zeller Company, Los Angeles, entire load rejected and reshipped to El Paso, Texas.

November 15, 1957: 1874 lugs of Lula avocados shipped to California; 900 to Williams and Son Produce Company, Los Angeles, and 974 to Felix Cohen & Son, Oakland; 361 lugs out of the 900 unloaded at Los Angeles rejected and reshipped to Phoenix.*

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*Fred Piowaty, Secretary of Florida Lime and Avocado Growers, Inc., produced the records of these transactions showing net loss of $7,496. (R. 318-319.) He testified that these were not all of the California shipments by his company that were rejected upon arrival for failure to pass the 8% oil test, but only those accurately identifiable. (R. 330, 331.) Also, in explanation of the shipments made in the 1954-55 season—some in the latter part of October and forepart of November in 1954 (R. 502)—apparently without rejections, he testified that it was his understanding that the oil tests of these shipments were of composite samples, not of individual samples as in subsequent seasons. (R. 321.) However, appellants do not gainsay the propriety of testing individual samples under Sec. 792 of the Agricultural Code of California, which provides that "all avocados" shall contain not less than 8% of oil.

South Florida Growers Association, Inc.:

November 10, 11, 12 and 18, 1954: Four shipments made to Calavo Growers of California, or on order of Calavo; rejected at Los Angeles, 118 boxes (@ 40 lbs.) Lula avocados, 539 boxes Booth 7 avocados, 97 boxes Lula avocados, 72 boxes Lula avocados, respectively; all reshipped to Phoenix and there sold by Calavo.

November 16, 1955: 282 boxes (@ 40 lbs.) out of shipment of Lula avocados to Lucky Stores at San Leandro, on order of Calavo, rejected and reshipped to Portland.

November 26, 1956: 721 flats (@ 15 lbs.) out of shipment of Lula avocados to Calavo, at Los Angeles, rejected and reshipped to Phoenix.

November 14, 1957: 492 flats out of shipment of Lula avocados to Lucky Stores, Leandro, on order of Calavo, rejected and reshipped to Salt Lake City.

Reshipment of the rejected avocados entailed added transportation and handling charges and, in some instances resale at much lower prices to avoid overripening of the fruit. Aside from the direct cash loss, forced sale of the fruit in other markets had an unsettling effect upon the shipments that were being made to these markets directly from Florida. (R. 267-268.) Above all else, the difficulty experienced by appellants has been inability to set up a schedule of assured deliveries to California of avocados with not less than 8% oil content, to synchronize with a sustained program of retail promotion and advertising of the fruit, thus limiting the marketing of their avocados in California to sporadic sales. (R. 265-266.)

It is of interest to note incidentally that the Calavo organization, serving as selling agents for appellant South Florida Growers Association, Inc., considered the rejected Florida avocados with less than 8% oil content suitable for sale through its offices in Phoenix, Portland and Salt Lake City. (R. 438-439.)

Appellees' evidence

No evidence was introduced by appellees in refutation of the testimony of appellants' witnesses, nor was there impeachment of this testimony in any particular.

In the amended answer to the complaint, a "fifth defense" was interposed to the effect that the maturity and quality standards promulgated under the Florida avocado marketing order, and the methods of administration thereof, are unreasonable, arbitrary and invalid in that they fail to comply with the requirements of the Marketing Agreement Act of 1937. (R. 119, 787.) During the trial of the case, however, this defense was withdrawn. (R. 571.)

The principal witness for appellees, Dr. David Appleman, Professor of Plant Nutrition at the University of California in Los Angeles, testified that he has been using avocados as subject material in some of his research work; that oil is one of the substances that develops and changes during the process of development of the avocado, and that as such he has studied it. (R. 648.) With this statement and nothing more, Dr. Appelman was asked, "In your opinion is oil content a reliable index of avocado maturity?" and he answered, "In my opinion it is as good an index as we can have at present." (R. 648.)

The further examination of Dr. Appelman elicited the following: that his work has had nothing to do with maturity or edibility of the fruit; that it deals with some enzymitic changes in the fruit and has relationship to some cancer studies; that all of his work has been done with only two varieties of California avocados, the Fuerte and the Hass, both of oil content as high as 24% to 26%; that "I don't know anything about Florida avocados." (R. 654-655, 658.)

Appellees' witness H. W. Poulsen, Chief of the Division of the Standardization and Inspection Services of the California Department of Agriculture, was permitted to answer whether in his opinion the 8% oil standard has been effective in keeping immature avocados off the market, without particularization of any kind, and of course answered in the affirmative. (R. 631.) He could name no variety of California avocados that has had difficulty in meeting the 8% oil test. (R. 631-632.) On cross-examination he stated that in large part the Fuertes sold in California have more than 8% oil content; that a Fuerte avocado is better if it has more than the required 8% oil content. (R. 634-635.)

Other witnesses for appellees were Presley Wiggs, Assistant General Manager of Calavo Growers of California, a cooperative, and Albert C. Jones, a former employee of Calavo, now sales manager for Western Fruit Growers Sales Company of California. Calavo has a somewhat anomalous relation to this case. For many years prior to this lawsuit, Calavo served as selling agent for Harold E. Kendall and then for appellant South Florida Growers Association, Inc. when it succeeded to Kendall's individual business and, as

such agent, Calavo sold Florida avocados in substantial volume through its many sales offices in all parts of the United States. (R. 667-669, 674-675.) In this litigation, however, Calavo has leagued itself actively with appellees at all stages of the case.* The chameleon-like role of Calavo is exemplified by the testimony of the witnesses Presley Wiggs and Albert C. Jones.

Both of these witnesses testified that they had experience in the marketing of Florida avocados, as employees of Calavo, in the southwestern part of the United States, particularly sale of some of the West Indian varieties of low oil content grown in Florida, such as the Fuchs, Pollock, Trapp and Waldin varieties. (R. 669, 675.) Both stated that in their opinion the marketing of these West Indian varieties in California would not be commercially expedient or profitable because the ripening period of these avocados is shorter than that of the hybrids, such as the Lula, Hickson and the several Booth varieties. (R. 667, 670.)

Mr. Wiggs, in his statement regarding the potential profitability of marketing the West Indian avocados in California, first estimated the transit time from Florida to California by refrigerated truck at five days, but later modified this estimate to four and a half days; that if the fruit on that truck were pre-sold, it would probably take another two to three days to dispose of it, or five or more days if not pre-sold, and that this would not leave adequate time for the retailer to turn the merchandise at a profit. (R. 667.) On cross-examination, however, the witness testified

*Calavo's attorney, William A. Norris, participated in the taking of the depositions, also as co-counsel for the defendants upon the trial of the case in the district court. (R. 145, 557.)

that Calavo has handled sales of the West Indian avocados, as well as other varieties grown in Florida, throughout the United States, excepting only California, and has made substantial sales of these avocados in Washington, D. C., New York, Boston, Cleveland, Chicago, Kansas City, Atlanta, New Orleans, Houston, San Antonio, Dallas Denver, Salt Lake City, Phoenix, El Paso, Seattle and Portland (R. 669); that the transit time from Florida by refrigerated truck to Denver, Phoenix or El Paso is as much as three and a half days (R. 670); that under refrigeration the ripening process is slowed down to a negligible point (R. 670), which applies also to the time of continued refrigeration upon arrival at wholesale produce markets, or in the refrigerated storage rooms of chain store retailers.

While it is undisputed that, in general, the ripening period of West Indian avocados is somewhat shorter than that of the hybrids, the difference is exaggerated by appellees' witnesses. Particularly as to the Waldin, by far the volume leader of the West Indian avocados produced in Florida.* In the tabulation of palatability tests of 14 varieties of Florida avocados made at the U. S. D. A. Orlando Station in the 1955-56 season, over a period of six weeks, there is shown the ripening time for each sample under identical conditions of transit and storage (two to three days transit by rail from Homestead to Orlando, followed by storage in the Or-

*Volume of Waldin shipments (Defts. Ex. "E," R. 488-492):

1955-56	50,259 bu.	9.73% of crop
1956-57	38,148 "	8.68% "
1957-58	60,261 "	10.25% "
1958-59	12,808 "	7.46% "
1959-60	30,980 "	9.15% "

lando laboratory at 80° F.). Duration of storage time for the six samples of Waldins was 5, 6, 6, 7, 6 and 5 days respectively, as compared with 7 to 8 days for the Booth 8, or 6, 7 to 8 days for the Booth 7, or 6 to 8 days for the Lula, or 6 to 7 days for the Hickson. (Pl. Ex. 25, R. 483-484.) Thus, even without refrigeration, the difference in ripening time between the Waldin and the hybrid varieties lends slight support for the opinions of appellees' witnesses as to the marketability in California of this important West Indian variety.

In another aspect, the testimony of appellees' witnesses exposes the competitive urge of the local growers and handlers of California avocados to keep the Waldin and other Florida avocados out of the state. As appears from the testimony of Presley Wiggs, the peak of the California avocado season is in February and March; the low point in production and sales is during September, October and November, and this is when the prices are highest; the prices begin to recede when the Fuertes begin to come into the market about the middle of November. (R. 665-666.) September, as it happens, is the month of heaviest shipment of the Waldin avocados; some in the last part of August, some also in the first part of October. (Pl. Ex. 4 and 7, R. 356, 361.) When it is added that the Booth 8 and Lula become abundant in October and the Booth 7 in November, the three leaders in volume, and that this is the most favorable time for the marketing of this fruit in California, it is apparent why retention of the 8% oil embargo against the Florida avocados is prized for the artificial competitive advantage it gives to the California avocado industry.

SUMMARY OF THE ARGUMENT.

Congress, in recognition of the vital importance of agriculture as a mainstay of the national economy, has instituted vast national regulatory programs to promote efficient and profitable operation of this industry. Among these programs is regulation of the interstate commerce in agricultural commodities, in the manner provided by the Agricultural Marketing Agreement Act of 1937. Interstate commerce in the avocados grown in Florida is governed by a marketing agreement and order made by the Secretary of Agriculture of the United States pursuant to the authority vested in him by said Act of Congress. The salient feature of this marketing order is to establish and enforce standards of quality to be met by these avocados as a condition precedent to marketing, thereby to promote consumer acceptance of the fruit by keeping off the market avocados that are immature or otherwise of inferior quality.

Notwithstanding such federal regulation, whereby interstate shipment of the Florida avocados is barred unless accompanied by a certificate of compliance with the federal standards of maturity and quality, sale of the Florida avocados in California, a prime market for the fruit, is restricted to avocados containing not less than 8% of oil, the standard of maturity and quality under Section 792 of the Agricultural Code of California. The evidence in this case establishes, without contradiction, that oil content is not a valid determinant of the maturity or quality of the avocados grown in Florida; that some of the varieties of the fruit grown in Florida are of extremely low oil content, but are none the less mature and of good quality; that other varieties, although they

ultimately attain somewhat higher oil content, do so inconsistently and only long after they have reached maturity and maximal quality and are ready for marketing; that, consequently, oil content has not been adopted under the federal regulations as an indicant of maturity or quality of the Florida avocados; instead, for each of the varieties of avocados grown commercially in Florida, in each crop season, permissible picking dates are assigned in correlation with attainment by avocados of the particular variety of specified minimum weight or diameter.

By enforcement of Section 792 of the Agricultural Code of California to bar sale in that state of Florida avocados with less than 8% oil content, in disregard of the certification of such avocados under federal law and regulations as mature and of requisite quality for interstate marketing, the major part of the Florida crop is excluded entirely from the California market and sale of the Florida fruit in that state is limited to sporadic shipments late in the marketing season, even then at risk of condemnation and substantial loss. The Supremacy Clause of the United States Constitution forbids such flagrant disregard of federal law and regulations.

Further, application of California's 8% oil content requirement to the Florida avocados offered for sale in that state is an impermissible interference with the freedom of commerce among the several states, in violation of the Commerce Clause of the Constitution, also a

denial of the equal protection of the laws guaranteed by the Fourteenth Amendment. No valid local police purpose is served by barring from sale avocados that of their innate nature and conditions of growth happen to have less than 8% oil content, but cannot for that reason be legitimately branded as immature or of inferior quality, yet lack of 8% oil content is the only basis upon which appellees and their subordinates have barred Florida avocados from sale in California. The only purpose thus served is to give competitive advantage to the growers and handlers of the avocados grown in California, the preponderant varieties of which happen to have oil content far in excess of 8%, but are not for that reason more healthful or of quality superior to that of the varieties which come to maturity with less than 8% oil content. The result is invidious discrimination against the producers and handlers of the Florida fruit, as well as restriction of interstate commerce, unjustifiable as a purported exercise of the police power of the state to protect its inhabitants from consumption of unhealthful food, or from fraudulent imposition.

ARGUMENT.

I.

Application of Sec. 792 of the Agricultural Code of California to avocados grown in Florida and shipped for sale in California, to bar sale in that state of Florida avocados with less than 8% oil content, after certification under valid federal law and regulations that such avocados are of requisite quality and maturity for marketing in interstate commerce, is precluded by the Supremacy Clause of the United States Constitution.

As heretofore stated, since June 11, 1954 all shipments of Florida avocados in interstate commerce have been governed by the Federal Agricultural Marketing Agreement Act of 1937 and the marketing order made thereunder, with respect to these avocados, by the Secretary of Agriculture of the United States. (Florida Avocado Order No. 969, referred to as No. 69, R. 15-33.) The Florida avocado marketing agreement is of quite limited scope. Of the various procedures designed by the Marketing Agreement Act to establish and maintain "orderly marketing conditions for agricultural commodities in interstate commerce," the Florida avocado agreement originally included only one, *viz.*: "To establish and maintain such minimum standards of quality and maturity and such grading and inspection requirements for agricultural commodities enumerated in section 608c(2) of this Title, other than milk and its products, in interstate commerce as will effectuate such orderly marketing of such agricultural commodites as will be in the public interest." (Sec. 602(3), *infra*, p. 89.)

Subsequently, pursuant to authorization by amendment of the Act adopted August 28, 1954, the Florida avocado agreement was amended to bring within its scope regulation of the containers to be used in the packaging of the fruit.* also provision for establishment of marketing research and development projects designed to improve or promote the distribution and consumption of the fruit, the expense of such projects to be paid from the funds collected pursuant to the marketing order. (20 F. R. 2587, 3259, 4177.)

That the Agricultural Marketing Agreement Act is a valid exercise of the power of Congress to regulate commerce among the several states is not disputed in this case. (See: *United States v. Rock Royal Co-Op, Inc.*, 307 U. S. 533, 59 S. Ct. 993; *United States v. Wrightwood Dairy Co.*, 315 U. S. 110, 62 S. Ct. 523.) Also, notwithstanding the earlier pleading of a defense to the contrary, it is now undisputed in this case that the maturity and quality standards promulgated by the Secretary of Agriculture under the Florida avocado marketing order, and the methods and procedures used in the administration thereof, are in compliance with

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*As to the containers in which the Florida avocados enter the California market, regulation under federal law is accepted as conclusive, *viz.*:

Agricultural Code of California, Sec. 788:

"Nothing in this chapter shall be construed to (a) conflict with any California or federal laws or regulations regarding net weight or other markings on containers or subcontainers, or (b) prohibit the shipment, transportation, delivery for sale or sale of fruits, nuts or vegetables, imported into this State in containers established as standards by the applicable laws or regulations of the United States." (Deering's California Codes, Agriculture, 1962 edition; clause (b) added by Stats. 1949, ch. 415, §1, p. 762.)

the requirements of the Marketing Agreement Act. (*Supra*, p. 34.)

Every load of avocados grown in Florida, when it leaves that state and enters into the stream of interstate commerce, is accompanied by a certificate of inspection issued by the joint Federal-State Inspection Service of the U. S. Department of Agriculture and the Florida Department of Agriculture attesting that the avocados meet the requirements for interstate marketing of the fruit under the orders of the Secretary of Agriculture of the United States. (*Supra*, p. 8.) Thus, the question to be adjudicated is whether in face of such certification of the Florida avocados as of requisite maturity and quality for sale in interstate commerce, such avocados may be barred from sale in California if of less than 8% oil content, a requirement entirely foreign to determination of maturity and quality of the fruit under federal regulation.

The opinion of the District Court, it is submitted, misconceives the nature of the Agricultural Marketing Agreement Act and the action taken thereunder with respect to the Florida avocados. The argument is that the federal law does not cover the whole field of interstate shipment of avocados; that Florida Avocado Order No. 69 does not govern interstate shipment of the avocados grown in California, or that might be grown in Texas or Louisiana; that for all the federal law declares, avocados grown in any state but Florida may be sold in California without any standards to insure maturity; that since Congress has not established a complete regulatory scheme which covers "the whole problem," it has left a wide field for the protection of

consumers by the states in the appropriate exercise of state police power. (Opinion of District Court, at R. 767.)

By this logic, the Marketing Agreement Act is rendered meaningless and the national policy served by the Act is nullified. A marketing order under the federal statute governs the interstate marketing of a specified agricultural commodity coming from a specified regional area, the smallest regional production or marketing area which the Secretary finds practicable, consistently with carrying out the declared policy of the Act. Further, the Act provides that orders issued thereunder which are applicable to the same commodity shall, so far as practicable, prescribe such different terms, applicable to different production areas and marketing areas, as the Secretary finds necessary to give due recognition to the differences in production and marketing of such commodity in such areas. (Sec. 608c (11), *infra*, p. 94.)

While these provisions limit the application of a particular marketing order to a specified commodity coming from a specified region, the matter regulated by the order is the marketing of such commodity throughout the United States. As to such commodity, entering the stream of interstate commerce from the designated region, the federal regulatory scheme is complete of itself, necessarily exclusive and not ancillary to regulation of such commerce under the laws of any state.

The conclusion of the District Court that there is no conflict between application to the Florida avocados of California's 8% oil content requirement, as a condition

precedent to sale of the fruit in that state, and any federal law or regulation, is contrary to all the evidence in the case. Not by inadvertence, evasion or scientific error, but as the result of horticultural study and experience, oil content has been rejected as a valid determinant of maturity or quality of the varieties of avocados grown in Florida. In the administration of Florida Avocado Order No. 69, accordingly, a basically different method of determining maturity and quality of the avocados governed by said order has been adopted and compliance with the standards thus imposed under federal law qualifies the fruit for marketing in interstate commerce, regardless of oil content. But not in California, say the appellees, because the Agricultural Code of that state forbids sale of avocados with not less than 8% oil content, regardless of place of growth, innate differences in varieties, or certification of the fruit as mature and of requisite grade under valid federal law and regulation.

In this, declares the District Court, there is no conflict, citing *Huron Portland Cement Co. v. Detroit,* 362 U. S. 440, 80 S. Ct. 813. That this case does not support appellees' contention, adopted by the District Court, is readily apparent. The alleged conflict, in the case cited, was between federal regulation of the operation of vessels engaged in interstate commerce, including inspection of their equipment, and enforcement against the owner of two federally licensed vessels of certain provisions of the Smoke Abatement Code of Detroit by criminal proceedings on a charge of causing excessive emissions of smoke from the boilers of the vessels while docked at the Port of Detroit. This court declared that the problem of air pollution is pe-

culiarly a matter of local concern, not within the scope of federal regulation; that the aim of federal regulation was to protect the crews and passengers of the inspected vessels from the perils of maritime navigation by seeing to it that the equipment could be safely employed in the proposed service, while the aim of the anti-smoke ordinance was to protect health and the cleanliness of the local community, and that there was no overlap between the scope of the federal inspection laws and the city ordinance. In the present case, by contrast, the aim of the federal regulation is to establish and maintain orderly marketing of the Florida avocados in interstate commerce, in protection of the national economy, a matter within the plenary and supreme power of the federal government, and the challenged state action directly impinges upon a substantial segment of this commerce.

Quite astonishing is the statement of the District Court that "Both the state and the federal requirements may be, and are being enforced without any clash between the two authorities." The court apparently failed to note the evidence that substantial shipments of Florida avocados to California by appellants were barred from sale in that state by application of the 8% oil test (Plaintiffs' exhibits 17 and 21, R. 438, 443; also *supra*, pp. 32-33), also the evidence that urgent demand for other shipments to California could not be met by appellants because oil tests procured at the University of Florida Subtropical Experiment Station at Homestead, Florida, indicated that the avocados available for such shipments would be rejected for sale in California, although eligible for interstate marketing under federal law and regulations. (Plaintiffs' exhibits 12 and 13, R. 371, 375; also R. 257-262.)

Abundant decisions of this court, going back to the historic case of *Gibbons v. Ogden,* 9 Wheat. 1, 6 L. Ed. 23 (1824), support appellants' contention. In the exercise of its plenary power to regulate commerce among the states, Congress has seen fit to enact legislation pursuant to which the marketing of all the avocados produced in South Florida, wherever these avocados may be offered for sale, has come under the aegis of the national government. Recognition of the paramount authority of this exercise of power by Congress is the most basic principle of our federal government. As tersely expressed by Mr. Chief Justice Hughes: "There is no room in our scheme of government for the assertion of state power in hostility to the authorized exercise of federal power." (*Simpson v. Shepard,* 230 U. S. 352, 33 S. Ct. 729, at p. 739.)

Reference is made to some of the decisions of this court deemed to be controlling precedents in the present case, as follows:

Currin v. Wallace, 306 U. S. 1, 59 S. Ct. 379, and *Campbell v. Hussey,* 82 S. Ct. 327:—In the earlier case, the constitutionality of the Tobacco Inspection Act of August 23, 1935, providing for inspection and grading of the tobacco to be auctioned at the various markets in the tobacco-growing states, was sustained. It was held, first, that the purchases and sales of tobacco at the auction markets were transactions in interstate commerce, subject to congressional regulation; that inspection and establishment of standards for commodities has long been regarded as appropriate to the regulation of trade, both by the state governments and the

federal government, but that the inspection laws of a state relating to commodities involved in interstate transactions are subject to the paramount regulatory power of Congress.

The Tobacco Inspection Act again came to the attention of this court in *Campbell v. Hussey*, an action by owners and operators of tobacco warehouses in Georgia to enjoin officials of that state from enforcing certain provisions of the Georgia Tobacco Identification Act. Under the federal regulations, a certain type of flue-cured tobacco was designated as type 14. Although it was stated in the definition of type 14 that the tobacco was produced principally in the southern section of Georgia and to some extent in Florida and Alabama, the designation "type 14" was made applicable to all tobacco of the kind described regardless of geographical origin. The challenged Georgia enactment defined type 14 tobacco as "that flue-cured leaf tobacco grown in the traditional loose-leaf area which consists of the States of Georgia, Florida and Alabama," and provided that such tobacco received in a warehouse for sale shall be marked with a white sheet ticket, in lieu of the blue ticket called for by the federal regulations. Such legislation by the state, even if regarded as merely supplementary to the federal regulation, was held to be precluded by congressional pre-emption of the field of regulation; that the "official standards" established by the Secretary of Agriculture pursuant to the federal statute were intended to be uniform, in order effectively to accomplish their purpose, and that such purpose would be thwarted by sanctioning amendment or modification under state law.

In the present case, there is both pre-emption and conflict. Establishment of standards of quality and maturity to qualify the avocados grown in the designated Florida area for sale throughout the United States could, of course, be undertaken only by the federal government. Such standards, emanating from a single authority, subject the fruit to the one set of tests of quality and maturity imposed by said authority. To permit subjection of the fruit to other tests of quality and maturity, under state law, would give to each state a right of total or partial veto of the federal regulation. It need hardly be added that there is substantial conflict when the state-imposed test of quality and maturity entirely ignores the federally-imposed test and substitutes a fundamentally different criterion of its own.

McDermott v. Wisconsin, 228 U. S. 115, 133, 33 S. Ct. 431, 435:—Wisconsin law regulating the labeling of glucose mixtures offered for sale at retail held to be unenforceable against sale of the product labeled in compliance with the requirement of the federal Pure Food and Drug Act.

Franklin National Bank of Franklin Square v. People of State of New York, 347 U. S. 373, 375-379, 74 S. Ct. 550, 552-554:—New York Banking Law, prohibiting the use of the word "savings" in the name of any bank other than its own chartered savings banks or savings and loan associations, held to be in conflict with the Federal Reserve Act and the National Bank Act, therefore inapplicable to a national bank using the word "savings" in its signs and advertising. This court said: "There appears to be a clear con-

flict between the law of New York and the law of the federal government. We cannot resolve conflicts of authority by our judgment as to the wisdom or need of either conflicting policy. The compact between the states creating the federal government resolves them as a matter of supremacy. However wise or needful New York's policy, a matter as to which we express no judgment, it must give way to the contrary federal policy."

Hines v. Davidowitz, 312 U. S. 52, 61 S. Ct. 399:— Pennsylvania adopted an Alien Registration Act in 1939, followed by enactment of a federal Alien Registration Act in 1940, and it was held by this court that the action of Congress foreclosed further enforcement of the Pennsylvania law. The opinion of the court stresses the national concern with the problem of alien registration because of treaties with other nations dealing with rights of aliens, also the need to harmonize alien registration with the national policies reflected in the immigration and naturalization laws, and concludes that from the nature of the problem and the legislative history of the federal Act it was apparent that the purpose of Congress was to provide for alien registration in a single and all-embracing national system.

In the present case, more obviously and flagrantly, the vital national interest served by the Marketing Agreement Act would be frustrated if the regulations issued thereunder to govern interstate commerce in agricultural commodities were permitted to be flouted by enforcement of state laws affecting the same commerce, claimed to constitute valid exercise of the state police power.

Wissner v. Wissner, 338 U. S. 655, 70 S. Ct. 398, and *Free v. Bland,* 82 S. Ct. 1089:—In the *Wissner* case, the widow of a veteran claimed that under the community property laws of California she was entitled to a one-half interest in the proceeds of a National Service Life Insurance policy in effect at the time of her husband's death, in which his mother was named as beneficiary. The National Service Life Insurance Act gave the insured the right to name a beneficiary within a designated class which included his mother, and it was held that disposition of the proceeds of the policy was governed solely by the provisions of the federal Act, without regard to the state community property laws.

The more recent *Free* case, which arose in Texas, related to United States savings bonds issued to "Mr. *or* Mrs." Free. Under the applicable Treasury Regulations, upon the death of Mrs. Free, her husband became entitled to exclusive ownership of the bonds as surviving co-owner, but the son as principal beneficiary under the mother's will asserted an interest in the bonds by virtue of the community property laws of Texas. The trial court awarded full title to the bonds to the husband, by virtue of the federal regulations, but awarded reimbursement to the son for loss of his mother's community half interest in the bonds, under the community property laws of Texas, and made the bonds security for the payment. Again this court held that the federal regulations were controlling and the state community property laws inapplicable. To quote from the opinion:

"The relative importance to the state of its own law is not material when there is a conflict with a valid

federal law, for the framers of our Constitution provided that the federal law must prevail. This principle was made clear by Chief Justice Marshall when he stated for the court that any state law, however clearly within a state's acknowledged power, which interferes with or is contrary to federal law, must yield. *Gibbons v. Ogden*, 9 Wheat. 1, 210-211, 6 L. Ed. 23. . . . The success of the management of the national debt depends to a significant measure upon the success of the sales of the savings bonds. The Treasury is authorized to make the bonds attractive to savers and investors. One of the inducements selected by the Treasury is the survivorship provision, a convenient method of avoiding complicated probate proceedings. Notwithstanding this provision, the state awarded full title to the co-owner but required him to account for half the value of the bonds to the decedent's estate. Viewed realistically, the state has rendered the award of title meaningless . . . If the state can frustrate the parties' attempt to use the bonds' survivorship provision through the simple expedient of requiring the survivor to reimburse the estate of the deceased owner as a matter of law, the state has interfered directly with a legitimate exercise of the power of the federal government to borrow money. We hold, therefore, that the state law which prohibits a married couple from taking advantage of the survivorship provisions of the United States savings bonds merely because the purchase price is paid out of community property must fall under the Supremacy Clause."

Cloverleaf Butter Co. v. Patterson, 315 U. S. 148, 167-168, 62 S. Ct. 491, 502-503:—Alabama officials, in enforcement of applicable state laws, seized for in-

spection and possible condemnation packing stock butter used by petitioner in the manufacture of process or renovated butter, and it was contended by petitioner that such state action was excluded by federal regulations concerning the manufacture of renovated butter. This court, sustaining petitioner's contention, said: "The manufacture and distribution in interstate and foreign commerce of process and renovated butter is a substantial industry which, because of its multi-state activity, cannot be effectively regulated by isolated competing states. . . . Its wholesome and successful functioning touches farm producers and city consumers. Science made possible the utilization of large quantities of packing stock butter which fell below the standards of public demand and Congress undertook to regulate the production in order that the resulting commodity might be free of ingredients deleterious to health. It left the states free to act on the packing stock suppliers prior to the time of their delivery into the hands of the manufacturer and to regulate sales of the finished product within their borders. But once the material was definitely marked for commerce by acquisition of the manufacturer, it passed into the domain of federal control. . . . Since there was federal regulation of the materials and composition of the manufactured article, there could not be similar state regulation of the same subject."

In the opinion of the District Court in the present case (R. 768), one sentence in the opinion in the *Cloverleaf Butter Company* case is cited in support of the judgment in this case, *viz.*: "But, of course, if any of the finished product is offered for sale in Alabama, such product becomes immediately subject to the re-

quirements of the pure food laws of that state." This statement, made in reference to the scope of regulation undertaken by Congress in the statutes then in force with respect to the manufacture of renovated butter, manifestly did not give advance sanction to whatever local regulation of sales of the finished product might be enforced in Alabama regardless of constitutionality of such regulation, or regardless of supervening federal legislation and regulation that might be or become applicable to such sales, as in *McDermott v. Wisconsin* and similar cases.

Oregon-Washington R. & Nav. Co. v. Washington, 270 U. S. 87, 46 S. Ct. 279:—The Director of Agriculture of the State of Washington, acting pursuant to a quarantine law of that state, made an order prohibiting shipment into Washington of alfalfa hay from areas in Utah, Idaho, Wyoming, Oregon and Nevada said to be infested with an insect known as alfalfa weevil, not prevalent in Washington, and it was held that this quarantine order was precluded by the Act of Congress approved March 4, 1917 authorizing the Secretary of Agriculture of the United States to quarantine any state, territory or district of the United States when he shall determine that such quarantine is necessary to prevent the spread of a dangerous plant disease, or insect infection, not theretofore widely prevalent in the United States.

The opinion of the District Court in the present case cites *Reid v. Colorado*, 187 U. S. 137, 23 S. Ct. 92, as compared with *Oregon-Washington R. & Nav. Co. v. Washington* (R. 768), but fails to note the differentiation between the two cases made in the opinion of this

court in the latter case, a differentiation even more pointedly applicable in the present case.

Chicago, Rock Island & Pacific R. Co. v. Hardwick Farmers Elevator Co., 226 U. S. 426:—Reciprocal Demurrage Law of Minnesota held to be superseded by Act of Congress to Regulate Commerce, June 29, 1906, regulating the furnishing of freight cars for interstate transportation.

Erie R. Co. v. New York, 233 U. S. 671, 34 S. Ct. 756:—Law of New York limiting hours of work of railroad employees held unenforceable against interstate railway carrier, in view of Act of Congress approved March 4, 1917, entitled "An Act to promote the safety of employees and travelers upon railroads by limiting the hours of service thereon." "When Congress acts in such a way as to manifest its purpose to exercise its constitutional authority, the regulating power of the state ceases to exist."

Southern R. Co. v. Railroad Commission of Indiana: —236 U. S. 439:—Indiana law requiring railway companies to place secure grab-irons and hand holds on the sides or ends of freight cars held to be superseded by the Federal Safety Appliance Act, providing for regulation of equipment of railroad cars.

Charleston & Western Carolina R. Co. v. Varnville Furniture Co., 237 U. S. 597, 35 S. Ct. 715:—Statute of South Carolina imposing a penalty on carriers for failure to adjust claims within forty days held to be an unconstitutional burden on interstate commerce, also in conflict with the provisions of the Act to Regulate Commerce, as amended June 29, 1906 (referred to as

the Carmack Amendment). The South Carolina statute was said to overlap the federal Act in respect of the subjects, the grounds, and the extent of liability for loss. Said Mr. Justice Holmes: "When Congress has taken the particular subject-matter in hand, coincidence is as ineffective as opposition, and a state law is not to be declared a help because it attempts to go farther than Congress has seen fit to go. The legislation is not to be saved by calling it an exercise of the police power."

In many cases adjudicated by this court in the last three decades, state legislation or administrative or judicial action affecting labor-management relations, held to be within the scope of regulation undertaken by the national government, has been declared inoperative, *e.g., Hill v. State of Florida*, 325 U. S. 538, 65 S. Ct. 1373—Florida statute requiring licensing of union business agents invalidated: *Bethlehem Steel Co. v. New York State Labor Relations Board*, 330 U. S. 767, 67 S. Ct. 1026—Application of New York's Labor Law to permit unionization of foremen held to be precluded by National Labor Relations Act; *La Crosse Telephone Corp. v. Wisconsin Employment Relations Board*, 336 U. S. 16, 69 S. Ct. 379—Certification of union by the Wisconsin Board as collective bargaining representative of company's employees held to conflict with National Labor Relations Act; *International Union of United Automobile, Aircraft and Agricultural Implement Workers of America v. O'Brien*, 339 U. S. 454, 70 S. Ct. 781—Michigan statute regulating the calling of strikes declared unconstitutional; *Amalgamated Association of Street, Electric Railway & Motor Coach Employees of America, Division 993, v. Wisconsin Employ-*

ment Relations Board, 340 U. S. 383, 71 S. Ct. 359—Wisconsin Public Utility Anti-Strike Law of 1949 declared unconstitutional; *Garner v. Teamsters, Chauffers and Helpers Local Union No. 776,* 346 U. S. 485, 74 S. Ct. 161, *Weber v. Anheuser-Busch, Inc.,* 348 U. S. 468, 75 S. Ct. 480, *San Diego Building Trades Council, etc. v. Garmon,* 359 U. S. 236, 79 S. Ct. 773, *Marine Engineers Beneficial Association v. Interlake Steamship Co.,* 82 S. Ct. 1237,—State court jurisdiction in labor-employer controversies barred when the controversies are found to be within the jurisdiction of the National Labor Relations Board, or arise from activities which might be subject to that agency's cognizance; *Railway Employes' Department v. Hanson,* 351 U. S. 225, 76 S. Ct. 714—Nebraska's constitutional provision prohibiting denial of work because of refusal to join a union held unenforcible to debar union shop agreement permitted under Railway Labor Act.

In the opinion of the District Court in this case, it is said: "The federal law says that Florida producers may not market their avocados unless they are picked and shipped in accordance with the shipping dates promulgated. It does not say that they *may* market their avocados without further inspection by the states if they comply with the shipping dates established by the federal order. When the Congress of the United States means to exert its constitutional supremacy thus, it is able to say so in clear and explicit terms." (R. 767.)

Congress has said, in clear and explicit terms, that marketing agreements and orders of the kind described in the Marketing Agreement Act may be made by the Secretary of Agriculture in order to promote the orderly marketing of the enumerated agricultural commodities

in interstate commerce; that, among other things, such agreements and orders may include the establishment and enforcement of such standards of quality and maturity and such grading and inspection requirements as will effectuate such orderly marketing of the specified commodities as will be in the public interest. (7 U. S. C. A. Sec. 602(3), *infra*, p. 89.) Florida Avocado Order No. 69 is an admittedly valid order made by the Secretary of Agriculture to carry out the purposes of the Marketing Agreement Act. The order applies to "all varieties of avocados grown in the production area" and governs the handling of these avocados. "Handle," as defined in the order, means "to sell, consign, deliver, or transport avocados within the production area and any point outside thereof in continental United States or Canada." (R. 20, Secs. 969.5 and 969.10 of order.) The order further provides: "Whenever the handling of any variety of avocados is regulated pursuant to Sec. 969.51, each handler who handles avocados shall, prior thereto, cause each lot of avocados handled to be inspected by the Federal-State Inspection Service and certified by it as meeting the applicable requirements of such regulation." (R. 29, Sec. 969.54 of order.)

What the District Court seems to say, in effect, is that such inspection and certification of the avocados by the designated governmental agency operates only as a permit to apply to the officials of each state for leave to sell, consign, deliver, or transport the avocados within its borders, nothing more. The federal law and the Florida avocado marketing order, on the contrary, make it clear and explicit that the matter regulated is the marketing of these avocados in all states of the Union,

and there was no need to add an admonition that such regulation was to be operative in California, as well as in all other states. As was said by this court in *Bethlehem Steel Co. v. New York State Labor Relations Board,* 330 U. S. at p. 772, 67 S. Ct. at p. 1029: "It has long been the rule that exclusion of state action may be implied from the nature of the legislation and the subject matter although express declaration of such result is wanting."

II.

Section 792 of the Agricultural Code of California, when applied to avocados grown in Florida and shipped for sale in California, imposes arbitrary conditions upon the importation and sale of legitimate and wholesome products of another state and thereby contravenes the Commerce Clause of the United States Constitution.

In the opinion of this court by Mr. Justice Jackson, in *H. P. Hood & Sons, Inc. v. Dumond,* 336 U. S. 525, 69 S. Ct. 657, after pointing out that a foremost purpose prompting the making of the Constitution was to do away with state laws hindering the free flow of trade between the states, it was said: "The material success that has come to the inhabitants of the states which make up this federal free trade unit has been the most impressive in the history of commerce, but the established interdependence of the states only emphasizes the necessity of protecting interstate movement of goods against local burdens and repressions . . . Our system, fostered by the Commerce Clause, is that every farmer and every craftsman shall be encouraged to produce by the certainty that he will have free ac-

cess to every market in the nation, that no home embargoes will withhold his export, and no foreign state will by custom duties or regulations exclude them. Likewise, every consumer may look to the free competition from every producing area in the nation to protect him from exploitation by any. Such was the vision of the founders; such has been the doctrine of this court which has given it reality." (336 U. S. at pp. 538-539, 69 S. Ct. at p. 665.)

Avocados grown in Florida have been barred from sale in California for failure to pass California's 8% oil test, though otherwise of unquestioned quality. It is stated in the opinion of the District Court that in the year 1925 practically all of the avocados produced in the United States came from California; that California then adopted the requirement that all avocados marketed in that state shall contain at least 8% of oil; that there was then and still is a body of respectable scientific opinion to the effect that the oil content of avocados in the hard state is the best indicator of maturity. (Opinion, R. 759.) To what body of scientific opinion the court refers is not apparent from the record of this case. More pertinent to the present controversy, however, is the fact that the court's statement refers to the avocados produced in California, not to the avocados produced in Florida.

The only testimony on the subject of the maturation of avocados of the varieties grown in Florida is that of Dr. Paul L. Harding, of the U. S. Department of Agriculture, and Dr. Roy W. Harkness, of the University of Florida. (*Supra*, pp. 10-30.) Virtually all of the modern learning on the subject is presented to

the court by this testimony. In no iota is the testimony of these witnesses contradicted or impugned. On the record before this court, no assertion or finding by the trial court regarding the determination of maturity of the Florida avocados merits consideration unless it can be said to be supported by the testimony of these witnesses.

It is admitted that "Some of the varieties of avocados grown in Florida cannot with commercial practicability meet the 8% oil requirement." (Opinion, R. 766.) But it is asserted, however, that exclusion of these varieties from the California market is of no practical commercial consequence because of poor shipping qualities and short shelf life. (Opinion, R. 766; also Findings 8 and 10, R. 780.) This is, of course, a *pro tanto* confession of appellants' case, attempted to be avoided by invoking the *de minimus* maxim.

First, the national interest in freedom of commerce between the states is not so lightly to be bargained away. To borrow the words of Mr. Justice Douglas, in his dissenting opinion in *Eli Lilly and Company v. Sav-On-Drugs, Inc.*, 366 U. S. 276, at p. 292, 81 S. Ct. 1316, at p. 1326: "This case on its own may do little injury. But it provides the formula whereby a State can stand over the channels of interstate commerce in a way that promises to do great harm to the national market that heretofore the Commerce Clause has protected."

It is indeed a dubious undertaking, to say the least, for a court to pass judgment upon the commercial practicability of marketing a particular variety of avocados at a given time of the year and over a given distance,

let alone to make such a judgment a basis for the determination of constitutional rights. Yet such a judgment was made by the District Court merely on the say-so of two Calavo salesmen, without specification of any instance or instances claimed to demonstrate the asserted impracticability of marketing any of the varieties of the Florida avocados in California. (*Supra*, pp. 35-38.) These same witnesses, on cross-examination, admitted that the Calavo organization during a span of years made sales of approximately a million dollars worth of Florida avocados annually in all parts of the United States, including particularly sales in the southwestern and Pacific Coast states, and including sales of the West Indian varieties of Florida avocados in all states except California.

Second, equally unsupported by substantial evidence, is the finding (No. 8, R. 780) that the West Indian varieties of avocados grown in Florida are of declining commercial importance. This finding is derived merely from a mathematical computation that the shipments of West Indian varieties of Florida avocados (not identified) in the 1959-60 crop season amounted to approximately 12% of all shipments of Florida avocados in that season, as against 20% in the 1955-56 season. Shipments in the two particular seasons are selected for comparison with no evidence that the growing conditions affecting the West Indian varieties of avocados were essentially the same in the 1959-60 season as in the 1955-56 season. To make such a comparison meaningful, account must be taken of the innate characteristics of the particular varieties, whether the trees on which they grow yield fruit every year or only in alternate years, whether these trees are especially susceptible

to injury by violent windstorms, frosts, or other vicissitudes of nature, and if they are blown down how long a time elapses before they are restored and start to yield again. Obviously, the Waldin avocados, most important commercially of the West Indian varieties, did not drop from 50,259 bushels in the 1955-56 season, and 60,261 bushels in the 1957-58 season, to 12,808 bushels in the 1959-60 season because of sudden decrease in commercial importance, but rather because of havoc suffered from the forces of nature.

Both Dr. Harkness and Dr. Harding, when asked to name the varieties of Florida avocados of major commercial importance, included the West Indian Waldin and Pollock varieties. (R. 250, 590.) Appellees' witnesses Presley Wiggs and Albert C. Jones testified that the Calavo organization sold West Indian varieties of Florida avocados throughout the United States, except in California, and named in particular the Fuchs, Pollock, Trapp and Waldin varieties. (R. 669, 675.) Harold E. Kendall, president of appellant South Florida Growers Association, Inc., included the Waldin and Pollock as major Florida varieties, and added that the Waldin has been planted in some quantity during the past ten years, also that the Trapp is a heavy producer in some years. (R. 255.)

Third, the attempt to segregate the West Indian varities of Florida avocados as the only varieties unable to meet the California 8% oil test, coupled with cynical dismissal of like difficulty in the case of all other varieties as due to temptation to rush immature avocados to market at the start of the season (R. 759, also Findings 4 and 11, R. 779, 780), flaunts the evidence that no

varieties of Florida avocados attain 8% oil content with the timeliness and consistency essential for effective participation in the California market. (*Supra,* pp. 10-33.) Practically all of the avocados shipped to California have been of the Lula variety only, and application of the 8% oil requirement has restricted such shipments to sporadic sales at an advanced stage of the marketing season. Even then, as appears from plaintiffs' exhibits 17 and 21 (R. 438, 443), several of such shipments have been rejected in California by imposition of the 8% oil test, to the extreme of a shipment of Lulas that left Florida on December 8, 1955—more than two months after commencement of the marketing of Lulas in the 1955-56 season—and was barred from sale in California upon test of oil content, then reshipped to El Paso, Texas, and resold at loss of $1,651.28. (R. 443-444.)

As to any and all varieties of avocados grown in Florida, appellants submit, exclusion from sale in California is an indefensible interference with the freedom of interstate commerce. Neither by legislative fiat, nor by judicial pronouncement, can these avocados be branded as immature simply because they do not contain 8% of oil, when nature speaks to the contrary. Intensive research by highly competent scientists, conducted continuously since Dr. Harkness began his research project on the determination of maturity of these avocados more than ten years ago, has established indisputably that there is no direct relation between oil content and maturity of these avocados and that percentage of oil content is not a valid determinant of maturity. (*Supra,* pp. 10-30.)

The record of this case is devoid of a shred of evidence indicating imperfection of any kind in the Florida avocados, unless inference of immaturity may be made from oil content below 8%, contrary to all the evidence in the case relating to Florida avocados. Appellees' witness H. W. Poulsen, Chief of the Division of Standardization and Inspection Services of the California Department of Agriculture, testified that all he knew about the Florida avocados that were rejected for sale in California was that it was reported to him that they had failed to pass the 8% oil test. (R. 640.) Dr. David Appleman, witness for appellees, stated that he had never conducted research dealing with the determinaton of maturity of avocados, but had used avocados as a subject matter in other research work, that all the work he has done with avocados has been with the two leading California varieties, the Fuerte and Hass, both of extremely high oil content; that he knows nothing at all about Florida avocados. (R. 658.)

Again referring to the testimony of Presley Wiggs and Albert C. Jones, relating to the marketing of Florida avocados by the nationwide Calavo marketing agency over the period from 1939 to 1958 (R. 668-669, 675), these witnesses raised no question whatever regarding the quality of these avocados in any respect, but only question of the commercial profitability of marketing the West Indian varieties in California in view of the time of transit from Florida. The Calavo sales included Florida avocados of the lowest oil content, the Fuchs, Pollock and Trapp, with oil content seldom more than 3%, and the Waldin with oil content ranging from about 3% to 5%. (Plaintiffs' exhibits 16 and 25, R. 389-438, 483-485.) Also in-

cluded in the Calavo sales were the resales in Arizona, Oregon and Utah, as agent for the appellant South Florida Growers Association, of several loads of Florida avocados rejected in California for failure to pass the 8% oil test. (Plaintiffs' Exhibit 17, R. 438.) It is to be assumed that Calavo would not have undertaken the marketing anywhere in the United States of Florida avocados deemed to be deleterious or of inferior quality.

It is said in the District Court opinion that what the appellants want is license to sell in California the Florida avocados of which they are handlers before these avocados reach "prime condition" and are only "acceptable," thus to "jump the gun" in order to get the high prices which prevail at the start of the season. (R. 766.) What may be the difference between "acceptable" and "prime condition" is not elucidated. There is, however, no declaration by the court that "acceptable" avocados are unhealthful or otherwise fit only to be condemned in the proper exercise of state police power. In connection with this statement, the court refers to the testimony of Dr. Harding, but search of the record fails to reveal anything said by Dr. Harding that supports the court's aspersion. In answer to interrogation by his honor Judge Bone, Dr. Harding stated that all avocados raised in Florida and shipped out of the state are in full compliance with the federal requirements. He added that "The avocados that are shipped certainly meet consumer acceptance and are palatable." (R. 582.) At a later point, Dr. Harding was questioned by his honor Judge Halbert as to the percentage of Florida avocados that never reach 8% oil content and the estimate of the witness was 40%. (R. 617.)

As to other varieties of Florida avocados, among them the volume leaders, Dr. Harding stated that at some time in the life of these avocados, if left on the tree long enough, some might attain 8% oil content, but that this maybe would be the last 20% of the shipment of these varieties. (R. 618.) Citing the Waldin and Booth 8 as examples, Dr. Harding stated that the avocados of these varieties are acceptable and desirable before they attain 8% oil content; that although they may not then have reached prime condition, "They are mature; they are acceptable; they are pleasing to the taste." (R. 619.) As to the Waldin, in particular, he added that by the time this variety might reach 8% oil content, "You would probably have all your crop drop," and as to the Booth 8, "You would probably shorten the season far beyond what it should be shortened, and with some of the other varieties the same way." (R. 619.) In summation: "It would mean that in the case of some of these the crop would be on the ground. In the case of others they may be overripe and not have carrying quality. In other words, you couldn't ship them any length of time or any distance. So in reality it would affect it the same way. It would mean that they would be practically unmarketable." (R. 620.)

Affirmatively, the oil content tests of Florida avocados made by Dr. Harkness, together with the maturity and palatability tests made under the direction of Dr. Harding, demonstrate that there is no correlation between the oil content of the varieties of avocados grown in Florida and the maturity and quality of these avocados. With no counter-testimony, it is evident that enforcement of California's 8% oil content requirement to bar sale of this fruit in that state is an im-

permissible restriction of the freedom of commerce between the states, by application of a standard irrelevant to the maturity and quality of the Florida fruit.

This is not a case of slight incidental effect upon interstate commerce of enforcement of an appropriate police regulation serving to protect the safety or health of the local inhabitants. It is, instead, a case in which the effect of the challenged state regulation, in application to the avocados grown in Florida, is to restrict sale in California of the fruit grown in another state by a measure unsupported by health or safety considerations, but effective to give the producers of California avocados competitive advantage over the producers of Florida avocados, at the same time the benefit of a protected market in which to sell their fruit to the local consumers. This result follows from the adventitious circumstance that most of the avocados grown in California are innately of high oil content, far above the required 8%, while those grown in Florida are predominantly of oil content less than 8%, but not for that reason less healthful or of inferior quality.

The only testimony that might have a bearing on the healthfulness or unhealthfulness of avocados relates to the California avocados of high oil content, not to the Florida avocados. Appellees' witness Dr. Appleman was asked about the character of the fat in the avocado and answered that a large proportion of this fat is unsatured, therefore less stable than saturated fat and more active in the process of digestion and metabolism; that recently the medical men have found that the unsaturated fats are less likely to form cholestoral bodies in the blood stream, along the walls of the arteries. (R. 651.) Why appelles saw fit to offer this reassurance

regarding the character of the fat in avocados is obscure, perhaps to palliate denial to the residents of California of unrestricted opportunity to choose the avocados of low oil content.

It is immaterial with what intent and upon what information the challenged California regulation was originally conceived; it is to be considered in the light of its present-day operation and the applicable present-day agricultural science. (*Nashville, Chatanooga & St. Louis Ry. v. Walters,* 294 U. S. 405, 414-415, 55 S. Ct. 486, 488, and cases cited in footnotes 5 and 6.) It is immaterial also that the regulation is enforced against the avocados grown in California as well as those grown in Florida, if the effect of enforcement against the Florida avocados is to obstruct or restrict interstate commerce without valid police justification. That such enforcement is prohibited by the Commerce Clause of the Constitution, without aid of implementation by congressional action, is established by numerous decisions of this court, among them the following:

Minnesota v. Barber, 136 U. S. 313, 10 S. Ct. 862: —A Minnesota statute prohibiting sale in that state for human food of cattle, sheep and swine not inspected and found healthy by a local Minnesota inspector within twenty-four hours before slaughter of the animals was held to be an unconstitutional interference with the freedom of interstate commerce. As pointed out in the opinion of the court by Mr. Justice Harlan, the practical effect of this requirement of local inspection was to restrict the slaughtering of animals whose meat was to be sold in Minnesota for human food to those engaged in such business in that state, since the time, expense and labor of sending animals from points outside Minne-

sota to be there inspected, and then to be brought back to be slaughtered within twenty-four hours after the inspection, amounted to an absolute prohibition upon sale in Minnesota of meat from animals not slaughtered in that state.

The basic principles underlying the decision in *Minnesota v. Barber* are applicable to the present case: that the validity of a state statute affecting interstate commerce is to be judged by its practical operation; that a burden imposed upon interstate commerce by application thereto of a state enactment is not to be sustained simply because the statute imposing it applies alike to the people of all states, including the people of the state enacting such statute; that no judicial tribunal can with propriety assume that the people of a state who may desire to purchase the food products of another state may not, with due regard to their health, rely upon inspections of the products in the states of origin; that the people of the state, in this instance California, have as much right to protection against the enactments of that state interfering with the freedom of commerce among the states as have the people of the other states.

In the present case, avocados grown in Florida are excluded from sale in California by application thereto of an 8% oil content requirement that has no horticultural validity as a determinant of the maturity or quality of this fruit. While the District Court stresses the fact that this requirement is applied also to the avocados grown in California, the fact that most of the avocados grown in California are of varieties that of their nature have oil content far in excess of the required 8% is ignored. It is the growers and handlers of these avocados of high oil content who alone derive

advantage from exclusion of the competitive Florida avocados, to the detriment not only of the producers and handlers of the Florida fruit but also to the potential purchasers and consumers of the fruit in California.

Brimmer v. Rebman, 138 U. S. 78, 11 S. Ct. 213:—A Virginia statute of the same kind held unconstitutional in *Minnesota v. Barber* was likewise held to have no real or substantial relation to the avowed object of protecting the people of the state against sale of unwholesome meat.

Dean Milk Co. v. City of Madison, 340 U. S. 349, 353-356, 71 S. Ct. 295, 297-299:—An ordinance of the City of Madison, Wisconsin, making it unlawful to sell any milk in that city as pasteurized unless processed and bottled at an approved pasteurization plant within a radius of five miles from the central square of the city, also unless obtained from a source of supply possessing a permit issued after inspection by Madison officials, such inspection not required to be made on farms located more than twenty-five miles from the center of the city, was held to impose an undue burden on interstate commerce, in violation of the Commerce Clause of the Constitution.

In the opinion of the court by Mr. Justice Clark, it was conceded that the avowed purpose of the ordinance, to protect the health of the people of Madison by regulating the sanitary conditions under which milk coming into the city was produced, was within the police power of the city. It was held, however, that the challenged regulations went beyond the reasonable and permissible exercise of such police power. To quote from the opinion: "But this regulation, like the provision invalidated in *Baldwin v. G.A.F. Seelig, Inc.*, 294 U. S.

511, 55 S. Ct. 497, in practical effect excludes from distribution in Madison wholesome milk produced and pasteurized in Illinois. . . . In thus erecting an economic barrier protecting a major local industry against competition from without the state, Madison plainly discriminates against interstate commerce. This it cannot do, even in the exercise of its unquestioned power to protect the health and safety of its people, if reasonable non-discriminatory alternatives, adequate to conserve legitimate local interests, are available. . . . To permit Madison to adopt a regulation not essential for the protection of local health interests and placing a discriminatory burden on interstate commerce would invite a multiplication of preferential trade areas destructive of the very purpose of the Commerce Clause. Under the circumstances here presented, the regulation must yield to the principle that 'one state in its dealings with another may not place itself in a position of economic isolation.' *Baldwin v. G.A.F. Seelig, Inc.*, 294 U. S. at p. 527, 55 S. Ct. at p. 502."

It is added, in footnote 4: "It is immaterial that Wisconsin milk from outside the Madison area is subjected to the same proscription as that moving in interstate commerce."

It was urged, in the dissenting opinion of Mr. Justice Black, that the Madison ordinance imposed no substantial discriminatory burden on interstate commerce; that the appellant Dean Milk Company, an Illinois distributor of milk and its products, could as a practical matter easily comply with the ordinance if it so desired; that "Dean's personal preference to pasteurize in Illinois, not the ordinance, keeps Dean's milk out of Madison." In the present case, by contrast, there is nothing at all the

producers and distributors of Florida avocados can possibly do to meet California's 8% oil content requirement if they wish to sell their fruit in that state, since they cannot alter the laws of nature accounting for the growth in Florida of avocados that come to maturity with less than 8% oil content.

Best & Co. v. Maxwell, 311 U. S. 454, 61 S. Ct. 334: —A North Carolina statute levying an annual privilege tax of $250 on every person or corporation, not a regular retail merchant in the state, who displays samples in a hotel room occupied temporarily for the purpose of securing retail orders, was held to be in contravention of the Commerce Clause of the Constitution. Quoting from the opinion of the court by Mr. Justice Reed: "The Commerce Clause forbids discrimination, whether forthright or ingenious. In each case it is our duty to determine whether the statute under attack, whatever its name may be, will in its practical operation work discrimination against interstate commerce. This standard we think condemns the tax at bar. Nominally the statute taxes all who are not regular retail merchants in North Carolina. We must assume, however, on this record that those North Carolina residents competing with appellant for the sale of similar merchandise will normally be regular retail merchants. The retail stores of the state are the natural outlets for merchandise, not those who sell only by sample. . . . Nonresidents wishing to display their wares must either establish themselves as regular North Carolina retail merchants at prohibitive expense, or pay this $250 tax that bears no relation to actual or probable sales but must be paid in advance no matter how small the sales turn out to be. Interstate commerce can hardly survive in so hos-

tile an atmosphere. . . . The freedom of commerce which allows the merchants of each state a regional or national market for their goods is not to be fettered by legislation, the actual effect of which is to discriminate in favor of intrastate businesses, whatever may be the ostensible reach of the language."

Bibb v. Navajo Freight Lines, Inc., 359 U. S. 520, 79 S. Ct. 962:—An Illinois statute requiring use of contour rear fender mudguards on trucks and trailers operated on the state highways, rather than the usual straight mudguards in general use in other states, although claimed to be a safety measure to avoid the throwing of debris into the face of a passing driver or into the windshield of a following car, was held to impose an unconstitutional burden on interstate commerce. The opinion of the court by Mr. Justice Douglas concludes: "We deal not with absolutes but with questions of degree. The state legislatures plainly have great leeway in providing safety regulations for all vehicles—interstate as well as local. Our decisions so hold. Yet the heavy burden which the Illinois mudguard law places on the interstate movement of trucks and trailers seems to us to pass the permissible limits even for safety regulations."

By parity of reasoning, although there is no question of the power of a state to adopt appropriate standardization laws regulating the sale of its agricultural products, the Commerce Clause of the Constitution debars use of this power to burden and restrict interstate commerce by unjustifiable application of such a state law to the agricultural product of another state, as in the present case.

Finally, in this phase of the argument, attention is directed to the case of *Edwards v. California*, 314 U. S. 160, 62 S. Ct. 164, dealing with the movement of a human being from one state into another. Under a law of California making it a misdemeanor to bring into the state an indigent person who was not a resident of the state, knowing him to be an indigent person, the appellant Edwards was adjudged guilty of the offense because he brought into California his wife's brother, a citizen of the United States residing in Texas, knowing him to be unemployed and penniless. All members of this court agreed that the judgment should be reversed, the majority on the ground that the statute imposed an unconstitutional burden upon interstate commerce, the minority on the ground that the statute ran afoul of the Privileges and Immunities Clause of the Fourteenth Amendment.

Of special interest, in relation to the present case, is what is said in the opinions about the power of a state to deny admission into its borders of an "indigent person," or "pauper." Mr. Justice Byrnes, delivering the opinion of the court, said: "In *City of New York v. Miln*, 11 Pet. 102, at p. 143, 9 L. Ed. 648, it was said that it is 'as competent and as necessary for a state to provide precautionary measures against the moral pestilence of paupers, vagabonds, and possible convicts, as it is to guard against the physical pestilence which may arise from unsound and infectious articles imported.' . . . This language has been casually repeated in numerous later cases up to the turn of the century. . . . *City of New York v. Miln* was decided in 1836. Whatever may have been the notion then prevailing, we do not think it will now be seriously con-

tended that because a person is without employment and without funds he constitutes a 'moral pestilence.' Poverty and immorality are not synonymous."

To say of the Florida avocados, in effect, that maturity and 8% oil content are synonymous, is no more defensible than to say that poverty and immorality are synonymous. The appellees, in strategic retreat, concede that the West Indian varieties of Florida avocados reach maturity with less than 8% oil content, but ask for a judicial determination that it would not be profitable to market these avocados in California, no matter where else they are marketed. Then, as to the West Indian-Guatemalan hybrid varieties of Florida avocados, it is urged that some time in the marketing season for these varieties they attain 8% oil content and may be marketed in California, an argument counter to the unrefuted evidence (1) that oil content is at no time a scientifically valid determinant of maturity of any of the varieties of avocados grown in Florida, (2) that the hybrid varieties, in fact, reach maturity with less than 8% oil content, (3) that the hybrid varieties never attain 8% oil content with the consistency and certainty necessary to avoid risk of condemnation if shipped to California, and essential to the effective marketing of these avocados in California, and (4) that as a matter of practical experience, shipments of hybrid avocados to California have been limited almost entirely to the Lula variety, shipments long after these avocados have reached maturity and have been in course of marketing throughout the country, shipments that have resulted in substantial losses because of failure to meet the California 8% oil test.

Appellants submit that obstruction of the marketing of the Florida avocados in California, by imposition of the 8% oil content requirement, violates the freedom of commerce among the states protected by the Commerce Clause of the Constitution, as interpreted and applied in the decisions of this court, therefore should be enjoined.

III.

Exclusion from sale in California of avocados grown in Florida, which are wholesome and palatable but of their nature have less than the 8% oil content required by Sec. 792 of the Agricultural Code of California, denies to appellants the equal protection of the laws called for by the Fourteenth Amendment.

Application to the Florida avocados of the 8% oil content requirement, as a condition precedent to sale of these avocados in California, is clearly arbitrary, since the evidence shows without contradiction that oil content is not a valid indicant of the maturity or quality of these avocados. A classification of all avocados with 8% oil content as wholesome and fit for sale, and all avocados with less than 8% oil content as a public nuisance fit only for condemnation (Sec. 785 of Agricultural Code of California, *infra*, p. 83), regardless of the innate characteristics and conditions of growth of the many different varieties of avocados, has no rational support in horticultural science and no rational relation to the purpose of protecting the people of the state from purchase and consumption of unwholesome fruit. Invidious discrimination results, in favor of the producers and handlers of the high oil con-

tent avocados grown in California and against the producers and handlers of the low oil content avocados grown in Florida, when the California 8% oil requirement is applied to the Florida avocados shipped for sale in that state.

The arbitrariness of the 8% oil standard, in application to the Florida avocados, is illustrated by other fruit maturity standards in the Agricultural Code of California. With respect to grapes, recognition is given to the differences in the characteristics of the numerous varieties, as well as differences in climatic conditons in the areas where they are grown, resulting in differences in percentage of soluble solids called for at maturity. (Deering's California Codes, Agriculture, 1962, Secs. 799 and 802.) Sec. 796, relating to grapefruit, establishes one standard of maturity for grapefruit grown in "the desert areas," defined as Imperial County and portions of Riverside, San Diego and San Bernardino counties, and a different standard of grapefruit grown in "other areas of the state." As to apples, comprehensive amended and added maturity provisions were adopted in 1957, giving recognition to the differences in varieties, also differences of climatic conditions in the various areas in which the fruit is grown. (Secs. 827-827.7.) Secs. 827.1, 827.2 and 827.7 provide as follows:

"Sec. 827.1. *Date of maturity for designated varieties: Determination and announcement: Rules and regulations: Basis of determination.* As to apples produced in California, the commissioners, under the supervision of the director, may determine, prior to the harvesting season, that apples of designated varieties in any area, county, or district within a county, are or

will be considered to be properly matured on a specified date, which date shall be announced by the commissioners. Designation of varieties shall be on the basis of availability of adequate data covering the known factors which determine maturity. The director may promulgate and adopt rules and regulations to establish minimum maturity standards for apples of designated varieties in any area, county, or district within a county. The determination as to maturity shall be based upon known factors of maturity, including soluble solids content of the juice, pressure test, size, color, condition of the flesh or other recognized methods of measuring the maturity of apples. (Added by Stats. 1957, ch. 879, sec. 2.)"

"Sec. 827.2. *Same: Dates of maturity: Establishment: Basis: Records.* Dates of maturity shall be established by the commissioners, under the supervision of the director, for areas, counties, or districts within counties, taking into consideration location, climatic conditions or other factors which are known to produce apples which vary as to dates of maturity. Such dates of maturity shall be based upon an investigation including the testing of the apples from representative orchards in each area and shall be set when such tests generally indicate that the apples in each such area are or will be properly matured. The commissioners shall prepare records, based on the factors of maturity used each year, and shall submit them to the director. (Added by Stats. 1957, ch. 879, sec. 3.)"

"Sec. 827.7. Same: Apples shipped into California from outside State: Exception from Secs. 827.1-827.6: Maturity requirements. The provisions of Sections 827.1 to 827.6, inclusive, do not apply to apples

shipped into California from outside of the State; however, such apples shall be properly matured as required in Section 821 or accompanied by an official certificate stating that such apples, at the time of harvest, met the maturity requirements of the state of origin. (Added by Stats. 1957, ch. 879, sec. 8.)"*

The eclectic maturity provisions aforesaid as to apples, adopted in the light of present-day agricultural science, are in sharp contrast with the rigid monolithic standard for determination of maturity of avocados established in 1925 and retained without change since that time. An exercise of police power, even if defensible and constitutional when initiated, gains no sanctity by lapse of time but must withstand the test of appropriateness and reasonableness in present-day enforcement.

For recent exposition of the meaning and force of the Equal Protection Clause of the Fourteenth Amendment, reference is made to the opinion of the court by Mr. Justice Burton in *Morey v. Doud*, 354 U. S. 457, 464-469, also the concurring opinion of Mr. Justice Douglas in *Garner v. Louisiana*, 82 S. Ct. 248, 258-261, and the concurring opinion of Mr. Justice Clark in *Baker v. Carr*, 82 S. Ct. 691, 727-734. In the light of the holdings of this court in these cases and earlier cases therein cited, appellants submit that equal protection of the laws is denied to them by application to the Florida avocados of California's 8% oil content test as the determinant of maturity, since on the record of

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*It is noted, incidentally, that the Florida standardization statute adopts all fruit and vegetable standards promulgated by the United States Department of Agriculture. (Florida Statutes Annotated, Vol. 17, Secs. 603.11 and 603.12.)

this case it is indisputable that percentage of oil content has no validity in horticultural science as a determinant of maturity of these avocados; that exclusion from sale in California of Florida avocados which reach maturity with less than 8% oil content has no rational relation to the avowed purpose of protecting the people of California from purchase of immature or unwholesome fruit, and that the effect of application of the 8% oil content requirement is merely to give competitive advantage to the growers and handlers of the avocados produced in California.

Conclusion.

Appellants submit that the judgment of the District Court denies effect, in a principal segment of the national market, to the regulation of the interstate marketing of the avocados produced in South Florida undertaken by the national government. The Supremacy Clause of the Constitution forbids such disregard and frustration of a federal program to protect the national economy by restoring and maintaining the orderly marketing of agricultural commodities. Further, the judgment sanctions unjustifiable obstruction of the freedom of commerce among the states, in contravention of the Commerce Clause of the Constitution, and denies to appellants the equal protection of the laws guaranteed by the Fourteenth Amendment.

Wherefore appellants pray that this court may reverse the judgment of the District Court, with directions to grant the relief prayed in appellants' complaint.

Respectfully submitted,

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Attorney for Appellants.

APPENDIX.

Agricultural Code of California, Division V, Standardization.*

Section 784. Preparation, etc., of nonconforming fruits, nuts or vegetables. It is unlawful to prepare, pack, place, deliver for shipment, deliver for sale, load, ship, transport, cause to be transported or sell any fruits, nuts or vegetables in bulk or in any container or subcontainer unless such fruits, nuts and vegetables, and their containers, conform to the provisions of this chapter.

Section 785. Abatement of noncomplying fruits, nuts and vegetables.

(Public nuisance: Holding.) Any lots of fruits, nuts or vegetables, including the containers thereof, which is not in compliance in all respects with the provisions of this chapter and rules and regulations issued hereunder, is hereby declared to be a public nuisance. Any enforcing officer, if he has reason to believe that any such lot is not in compliance as aforesaid, may hold such lot pending proceedings to condemn and abate such nuisance, as herein provided.

(Warning tag; Detachment, alteration, etc., unlawful.) The officer may fix to any lot so held a tag or notice warning that the lot is held and stating the reasons therefor. It is unlawful for any person other than an authorized enforcing officer to detach, alter, deface or destroy any such tag or notice affixed to any such lot, or to remove or dispose of such lot in any manner or under conditions other than as prescribed in

*Deering's California Codes, Agriculture, 1962 edition.

such tag or notice, except upon written permission of an authorized enforcing officer or by order of court.

(Notice: Contents.) The officer by whom any such lot is held shall cause notice of noncompliance to be served upon the person in possession of said lot. The notice of noncompliance shall include a description of the lot, the place where and the reasons for which it is held, and shall give notice that said lot is a public nuisance and subject to disposal as provided in this section, unless within a specified time said lot shall have been reconditioned or the deficiency otherwise corrected so as to bring said lot into compliance.

(Duty to notify owners.) If the person so served is not the sole owner of the lot; or does not have authority as agent for the owner to bring said lot into compliance, it shall be the duty of such person in writing to notify the officer by whom such lot is held of the names and addresses of the owner or owners and all other persons known to him to claim an interest in said lot. Any person so served shall be liable for any loss sustained by such owner or other person whose name and address he has knowingly concealed from such officer.

If the lot has not been reconditioned or the deficiency otherwise corrected so as to bring said lot into compliance within the time specified in the notice, then the enforcing officer shall cause a copy of said notice to be served upon all persons designated in writing by the person in possession of said lot to be the owner or to claim an interest therein. Any notice required by this section may be served personally or by mail addressed to the person to be served at his last known address.

(Abatement with consent.) The enforcing officer, with the written consent of all such persons so served, is hereby authorized to destroy such lot or otherwise to abate the nuisance. If any such person fails or refuses to give such consent, then the enforcing officer shall proceed as provided hereinafter.

(Petition for abatement.) If the lot so held is perishable or subject to rapid deterioration, the enforcing officer may file a verified petition in any superior or inferior court of the State to destroy such lot or otherwise abate the nuisance. The petition shall show the condition of the lot, that the lot is situated within the county, that the lot is held, and that notice of noncompliance has been served as herein provided. The court may thereupon order that such lot be forthwith destroyed or the nuisance otherwise abated as set forth in said order.

(Non-perishable lot: Report: Petition: Answer: Determination.) If the lot so held is not perishable nor subject to rapid deterioration, the enforcing officer shall immediately report the condition of said lot to the director. Within five (5) days from the receipt of a report, the director may file a petition in the superior court in the county where the lot is situated for an order to show cause, returnable in five (5) days, why the lot should not be abated. The owner or person in possession on his own motion within five (5) days from the expiration of the time specified in the notice of noncompliance may file a petition in said court for an order to show cause, returnable in five (5) days, why said lot should not be released to petitioner and any warning tags previously affixed removed there-

from. Final determination by said court in either case shall be within a period of not to exceed twenty (20) days from the date said petition was filed.

(Judgment: Sale: Costs deducted.) The court may enter judgment ordering that said lot be condemned and destroyed in the manner directed by the court or relabeled, or denatured or otherwise processed, or sold or released upon such conditions as the court in its discretion may impose to insure that the nuisance will be abated. In the event of sale by order of court, the costs of storage, handling and reconditioning or disposal shall be deducted from the proceeds of sale and the balance, if any, paid into court for the owner. (Amended by Stats. 1953, ch. 606, §2, ch. 752, §1; Stats. 1955, ch. 431, §1.)

Section 785.6. Civil liability of violator: Added penalty: Amount: Value of noncomplying fruits, etc., defined: Disposition of money recovered. Any person who violates any provision of this chapter shall, in addition to any penalty otherwise provided, be liable civilly, in an action brought by the director, for a penalty in an amount equal to the value which the fruits, nuts, or vegetables involved in the violation would have if they conformed to the requirements of this chapter. The value of such noncomplying fruits, nuts and vegetables shall be the current market value of lowest priced grade of a marketable commodity of like kind and nature at the time and place of the violation. Any money recovered under this section shall be paid into the Department of Agriculture fund.

Section 790. Fruit, nut and vegetable standards: Establishment. There are hereby established standards for fruits, nuts and vegetables which shall include

apricots, avocados, berries, cherries, citrus fruits, dates, grapes, nectarines, peaches, pears, oriental persimmons, plums, and fresh prunes, "wonderful" pomegranates, quinces, walnuts, artichokes, asparagus, Brussels sprouts, cantaloupes, carrots, cauliflower, celery, green corn, head lettuce, Italian sprouting broccoli, melons, onions, peas, potatoes, sweet potatoes, tomatoes and apples.

Section 792. Avocados.

(Freedom from defects: Tolerance.) Avocados shall be free from all defects, including but not restricted to those hereinafter mentioned, which singly or in the aggregate cause a waste of 10 per cent or more, by weight, of the entire avocado, including the skin and seed. Not more than 5 per cent, by count, of the avocados in any one container or bulk lot may be below the foregoing requirement.

(Definition.) "Defect" includes damage due to insect injuries, freezing injury, decay, rancidity, or other causes.

(Oil content.) All avocados, at the time of picking, and at all times thereafter, shall contain not less than 8 per cent of oil, by weight of the avocado excluding the skin and seed.*

Section 831. Violation of chapter: Misdemeanor: Punishment. The violation of any of the provisions of this chapter is a misdemeanor and punishable by a fine of not less than fifty dollars nor more than five hundred dollars, or by imprisonment in the county jail for not more than six months, or by both.

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*Legislative history of Section 792, Deering's Agricultural Code, page 240.

Agricultural Marketing Agreement Act of 1937.*

7 U. S. C. A. Sec. 601. Declaration of conditions.

It is declared that the disruption of the orderly exchange of commodities in interstate commerce impairs the purchasing power of farmers and destroys the value of agricultural assets which support the national credit structure and that these conditions affect transactions in agricultural commodities with a national public interest, and burden and obstruct the normal channels of interstate commerce. May 12, 1933, c. 25, Title I, §1, 48 Stat. 31; June 3, 1937, c. 296, §§1, 2(a), 50 Stat. 246.

7 U. S. C. A. Sec. 602. Declaration of policy; establishment of base periods for prices; marketing standards * * *

It is declared to be the policy of Congress—

(1) Through the exercise of the powers conferred upon the Secretary of Agriculture under sections 601-608, 608a, 608b, 608c, 608d-612, 613, 614-619, 620, 623, and 624 of this title, to establish and maintain such orderly marketing conditions for agricultural commodities in interstate commerce as will establish, as the prices to farmers, parity prices as defined by section 1301(a)(1) of this title.

(2) To protect the interest of the consumer by (a) approaching the level of prices which it is declared to be the policy of Congress to establish in subsection (1) of this section by gradual correction of the current level

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*The Agricultural Marketing Agreement of June 3, 1937 (7 U. S. C. A. Secs. 671-674) affirmed the validity of specified sections of the Agricultural Adjustment Act of May 12, 1933. (Historical note, 7 U. S. C. A., p. 337.)

at as rapid a rate as the Secretary of Agriculture deems to be in the public interest and feasible in view of the current consumptive demand in domestic and foreign markets, and (b) authorizing no action under sections 601-602, 608a, 608b, 608c, 608d-612, 613, 614-619, 620, 623, and 624 of this title which has for its purpose the maintenance of prices to farmers above the level which it is declared to be the policy of Congress to establish in subsection (1) of this section.

(3) Through the exercise of the powers conferred upon the Secretary of Agriculture under sections 601-608, 608a, 608b, 608c, 608d-612, 613, 614-619, 620, 623, and 624 of this title, to establish and maintain such minimum standards of quality and maturity and such grading and inspection requirements for agricultural commodities enumerated in section 608c(2) of this title, other than milk and its products, in interstate commerce as will effectuate such orderly marketing of such agricultural commodities as will be in the public interest. May 12, 1933, c. 25, Title I, §2, 48 Stat. 32; Aug. 24, 1935, c. 641, §§1, 62, 49 Stat. 750, 782; June 3, 1937, c. 296, §§1, 2(b), 50 Stat. 246, 247; Aug. 1, 1947, c. 425, §1, 61 Stat. 707; July 3, 1948, c. 827, Title III, §302(a), 62 Stat. 1257.

(4) Through the exercise of the powers conferred upon the Secretary of Agriculture under sections 601-604, 607, 608a, 608b, 608c, 608d, 608e-1, 608f, 612, 613, 614-19, 620, 623, and 624 of this title, to establish and maintain such orderly marketing conditions for any agricultural commodity enumerated in section 608c(2) of this title as will provide, in the interests of producers and consumers, an orderly flow of the

supply thereof to market throughout its normal marketing season to avoid unreasonable fluctuations in supplies and prices. As amended Aug. 28, 1954, c. 1041, Title IV, §401(a), 68 Stat. 906.

7 U. S. C. A. Sec. 608. Powers of Secretary—Investigations; proclamation of findings

(1) Whenever the Secretary of Agriculture has reason to believe that:

(a) The current average farm price for any basic agricultural commodity is less than the fair exchange value thereof, or the average farm price of such commodity is likely to be less than the fair exchange value thereof for the period in which the production of such commodity during the current or next succeeding marketing year is normally marketed, and

(b) The conditions of and factors relating to the production, marketing, and consumption of such commodity are such that the exercise of any one or more of the powers conferred upon the Secretary under subsections (2) and (3) of this section would tend to effectuate the declared policy of sections 601-608, 608a, 608b, 608c, 608d-612, 613, 614-619, 620, 623, 624 of this title, he shall cause an immediate investigation to be made to determine such facts. If, upon the basis of such investigation, the Secretary finds the existence of such fact, he shall proclaim such determination and shall exercise such one or more of the powers conferred upon him under subsections (2) and (3) of this section as he finds, upon the basis of an investigation, administratively practicable and best calculated to effectuate the declared policy of said sections.

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7 U. S. C. A. Sec. 608b. Marketing agreements; exemption from antitrust laws

In order to effectuate the declared policy of sections 601-608, 608a, 608b, 608c, 608d-612, 613, 614-619, 620, 623, and 624 of this title, the Secretary of Agriculture shall have the power, after due notice and opportunity for hearing, to enter into marketing agreements with processors, producers, associations of producers, and others engaged in the handling of any agricultural commodity or product thereof, only with respect to such handling as is in the current of interstate or foreign commerce or which directly burdens, obstructs, or affects, interstate or foreign commerce in such commodity or product thereof. The making of any such agreement shall not be held to be in violation of any of the antitrust laws of the United States, and any such agreement shall be deemed to be lawful: *Provided*, That no such agreement shall remain in force after the termination of said sections. May 12, 1933, c. 25, Title I, §8(2), 48 Stat. 34; Apr. 7, 1934, c. 103, §7, 48 Stat. 528; renumbered §8b and amended Aug. 24, 1935, c. 641, §4, 49 Stat. 753; June 3, 1937, c. 296, §1, 50 Stat. 246; June 30, 1947, c. 160, Title II, §206(d), 61 Stat. 208.

7 U. S. C. A. 608c. Order regulating handling of commodity—issuance by Secretary

(1) The Secretary of Agriculture shall, subject to the provisions of this section, issue, and from time to time amend, orders applicable to processors, associations of producers, and others engaged in the handling of any agricultural commodity or product thereof specified in subsection (2) of this section. Such persons are

referred to in sections 601-608, 608a, 608b, 608c, 608d-612, 613, 614-619, 620, 623 and 624 of this title as "handlers." Such orders shall regulate, in the manner hereinafter in this section provided, only such handling of such agricultural commodity, or product thereof, as is in the current of interstate or foreign commerce, or which directly burdens, obstructs, or affects, interstate or foreign commerce or product thereof.

Commodities to which applicable

(2) Orders issued pursuant to this section shall be applicable only to the following agricultural commodities and the products thereof (except canned or frozen grapefruit, the products of naval stores, and the products of honeybees), or to any regional, or market classification of any such commodity or product: Milk, fruits (including filberts, almonds, pecans and walnuts but not including apples, other than apples produced in the States of Washington, Oregon, Idaho, New York Michigan, Maryland, New Jersey, Indiana, California, Maine, Vermont, New Hampshire, Rhode Island, Massachusetts and Connecticut, and not including fruits for canning or freezing other than olives, grapefruit, cherries, cranberries, and apples produced in the states above named except Washington, Oregon and Idaho), tobacco, vegetables (not including vegetables, other than asparagus, for canning or freezing), hops, honeybees and naval stores as included in the Naval Stores Act and standards established thereunder (including refined or partially refined oleoresin). * * *

Notice and hearing

(3) Whenever the Secretary of Agriculture has reason to believe that the issuance of an order will tend

to effectuate the declared policy of sections 601-608, 608a, 608b, 608c, 608d-612, 613, 614-619, 620, 623, and 624 of this title with respect to any commodity or product thereof specified in subsection (2) of this section, he shall give due notice of and an opportunity for a hearing upon a proposed order.

Finding and issuance of order

(4) After such notice and opportunity for hearing, the Secretary of Agriculture shall issue an order if he finds, and sets forth in such order, upon the evidence introduced at such hearing (in addition to such other findings as may be specifically required by this section) that the issuance of such order and all of the terms and conditions thereof will tend to effectuate the declared policy of sections 601-608, 608a, 608b, 608c, 608d-612, 613, 614-619, 620, 623, and 624 of this title with respect to such commodity.

Milk and its products; terms and conditions of orders

(5) This part of section 608c relates to orders governing milk and its products.

Other commodities; terms and conditions of orders

(6) In the case of the agricultural commodities and the products thereof, other than milk and its products, specified in subsection (2) of this section orders issued pursuant to this section shall contain one or more of the following terms and conditions, and (except as provided in subjection (7) of this section), no others:

(A) Limiting, or providing methods for the limitation of, the total quantity of any such commodity or product, or of any grade, size, or quality thereof, pro-

duced during any specified period or periods, which may be marketed in or transported to any or all markets in the current of interstate or foreign commerce or so as directly to burden, obstruct, or affect interstate or foreign commerce in such commodity or product thereof, during any specified period or periods by all handlers thereof.

* * * * *

(F) Requiring or providing for the requirement of inspection of any such commodity produced during specified periods and marketed by handlers.

* * * * *

(H) Providing a method for fixing the size, capacity, weight, dimensions, or pack of the container, or containers, which may be used in the packaging, transportation, sale, shipment, or handling of any fresh or dried fruits, vegetables, or tree nuts: *Provided, however,* that no action taken hereunder shall conflict with the Standard Containers Act of 1916 and the Standard Containers Act of 1928;

(I) Establishing or providing for the establishment of marketing research and development projects designed to assist, improve, or promote the marketing, distribution, and consumption of any such commodity or product, the expense of such projects to be paid from funds collected pursuant to the marketing order.

Regional application

(11)(A) No order shall be issued under this section which is applicable to all production areas or marketing areas, or both, of any commodity or product thereof unless the Secretary finds that the issuance of several

orders applicable to the several regional production areas or regional marketing areas, or both, as the case may be, of the commodity or product would not effectively carry out the declared policy of sections 601-608, 608b, 608c, 608d-612, 613, 614-619, 620, 623, and 624 of this title.

(B) Except in the case of milk and its products, orders issued under this section shall be limited in their application to the smallest regional production areas or regional marketing areas, or both, as the case may be, which the Secretary finds practicable, consistently with carrying out such declared policy.

(C) All orders issued under this section which are applicable to the same commodity or product thereof shall, so far as practicable, prescribe such different terms, applicable to different production areas and marketing areas, as the Secretary finds necessary to give due recognition to the differences in production and marketing of such commodity or product in such areas.

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Further provisions of section 608c govern the procedure for adoption of marketing agreements, also the administration and enforcement of orders made by the Secretary of Agriculture in carrying out such agreements.